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Attorneys for Nonparty
HEWLETT-PACKARD COMPANY

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re IBM 30(b)(6) Deposition Subpoena
in the matter of:

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Plaintiff and Counterclaim
Defendant,

v.

PLATFORM SOLUTIONS, INC.,

Defendant and
Counterclaimant.

CASE NO. C07-80174 RMW (PVT)

Underlying action pending in the United
States District Court for the Southern
District of New York, CASE NO. CV 06-
13565 SCR

**DECLARATION OF ALEXANDER S.
KLEIN III IN SUPPORT OF HP'S
ADMINISTRATIVE MOTION TO
FILE UNDER SEAL UNREDACTED
PAGES OF ITS MOTION TO
MODIFY SUBPOENA AND FOR A
PROTECTIVE ORDER AND
DECLARATIONS IN SUPPORT
THEREOF**

Date: June 3, 2008
Time: 10:00 a. m.
Place: Courtroom 5
Before: The Honorable Patricia V.
Trumbull

1 I, ALEXANDER S. KLEIN III, hereby declare as follows:

2 1. I am an attorney licensed to practice before the courts of this State, and I
3 am a Senior Counsel in the Legal Department of Nonparty Hewlett-Packard
4 Company ("HP") currently providing legal counsel to HP's Imaging and Printing
5 Group. I make this declaration in support of HP's Administrative Motion to File
6 Under Seal Unredacted Pages of its Motion to Modify Subpoena and for a Protective
7 Order and Declarations in support thereof ("HP's Motion to Seal"), and specifically
8 to provide the Court with an explanation as to the confidential nature of the particular
9 material HP seeks to maintain under seal. All matters stated herein are of my own
10 personal knowledge, and if called as a witness, I could and would competently testify
11 thereto.

12 2. This matter arises out of IBM's issuance of a March 10, 2008 deposition
13 subpoena (the "Subpoena") to nonparty HP, in the underlying action entitled
14 *International Business Machines v. Platform Solutions Inc.* (S.D.N.Y. Case No. CV
15 06-13565 SCR) ("*IBM v. PSI*"). HP has ongoing business relationships with both
16 parties to the *IBM v. PSI* lawsuit, but is not a party to the underlying litigation.
17 Additionally, IBM and HP are competitors in the markets for desktop and laptop
18 computers, server hardware, and related services and products.

19 3. I have worked at HP since January, 1998. From the Spring of 2002 until
20 the Fall of 2007, I worked in HP's Business Critical Systems ("BCS") global
21 business unit. During my tenure at HP, I have supervised and worked on various
22 corporate legal matters involving HP's commercial and technology transactions,
23 intellectual property licensing, sales, Original Equipment Manufacturer ("OEM")
24 relationships (including distribution agreements), and antitrust and e-commerce
25 matters. In the course of my duties in BCS, I regularly interacted with HP
26 engineering, marketing, and senior staff personnel in its BCS global business unit,
27 and other HP functions including the Sales, Corporate Development, Legal,
28

1 Technology, Finance, and Marketing Departments. In many cases, I was the lead
2 Legal Department contact for the negotiation of prospective BCS business
3 relationships that HP had under consideration, whether it be for licensing, sales,
4 acquisition or otherwise. In the context of such proposed business relationships, I
5 was responsible for limiting and tracking the flow of commercially sensitive
6 information regarding select proposed business relationships, and for protecting such
7 material from public disclosure. I am thus readily familiar with how HP maintains
8 the confidentiality of this type of information, and with which matters, as a general
9 policy, warrant confidential treatment.

10 4. HP is a technology company whose stock is publicly traded on the New
11 York Stock Exchange. HP invests a significant amount of capital in research and
12 development each year. In the last two fiscal years alone, the company invested
13 roughly \$3.5 billion annually in research and development. See Exhibit 1. Attached
14 hereto as Exhibit 1 are true and correct copies of select pages from HP's Form 10-K
15 for fiscal year ending Oct. 31, 2007, including its *Consolidated Statement of*
16 *Earnings*, downloaded from HP's website at [http://media.corporate-](http://media.corporate-ir.net/media_files/irol/71/71087/FY0710K_AsFiled.pdf)
17 [ir.net/media_files/irol/71/71087/FY0710K_AsFiled.pdf](http://media.corporate-ir.net/media_files/irol/71/71087/FY0710K_AsFiled.pdf) on April 28, 2008.

18 5. Because of HP's status as a public company, and because of the
19 enormous investment that HP makes in R&D and other business initiatives, HP takes
20 extensive measures to protect its intellectual property and confidential proprietary
21 materials. Among other things, as a general practice, HP: (a) limits the internal HP
22 distribution of information regarding certain future business initiatives and
23 relationships (such as the one at issue here) to persons on a "need-to know" basis; (b)
24 enters into non-disclosure agreements with third parties regarding future initiatives;
25 and/or (c) includes confidentiality clauses in its contracts with all third parties
26 regarding future initiatives. These types of confidentiality measures are necessary to
27
28

1 prevent certain confidential business information from becoming public knowledge
2 and potentially affecting HP's competitive interests and/or its stock price.

3 6. The material that HP seeks to maintain under seal in relation to HP's
4 Motion to Seal is limited to select references to one of HP's proposed business
5 transactions. The references to this information can be found in the redacted portions
6 of HP's: (a) Motion to Modify Subpoena and for a Protective Order; and (b) the
7 Declaration of Steven Howard in Support of HP's Motion to Modify Subpoena and
8 for a Protective Order; and (c) certain exhibits attached to the Declaration of
9 Angelique Kaounis in Support of HP's Motion to Modify Subpoena and for a
10 Protective Order.

11 7. For ease of the Court's reference and pursuant to the requirements of
12 Civil Local Rule 79-5, the documents listed above in No. 6 are attached hereto in
13 redacted form as Exhibits 2-4, respectively. The nature of the proposed business
14 relationship referenced in the above-listed documents, as well as the potential
15 consummation of the relationship, are confidential matters about which only a
16 limited number of people at HP have knowledge. The team that worked on the
17 particular business matter at issue here was limited to a core group of individuals,
18 which consisted primarily of select HP executives of certain business units that
19 would be directly impacted by the proposed business relationship (and their
20 administrative assistants), select Corporate Development personnel, and a few HP
21 Legal Department personnel required to assist in the negotiations of the proposed
22 relationship. Within HP, certain proposed business transactions such as the one at
23 issue here are referred to by the use of code names, which is a precautionary measure
24 that HP takes to prevent inadvertent disclosure of such matters to unauthorized
25 personnel. Thus, the fact that HP even considered the proposed business relationship
26 at issue here is confidential.

1 8. Permitting disclosure of this type of information to competitors and the
2 public would cause serious competitive injury to HP because competitors could use
3 this otherwise confidential and valuable information to ascertain (1) where HP
4 contemplates potential growth in certain markets; and (2) HP's business strategies in
5 relation to these areas of technology and business. This type of material is clearly of
6 value to a competitor because a competitor can use this information to preempt
7 certain HP business efforts, and/or can concentrate its own efforts on areas where it
8 learns of HP's perceived concern or focus. The disclosure of this information could
9 damage not only HP's competitive interests vis-à-vis another competitor, but could
10 also affect HP's stock price on the open market, because, if certain confidential
11 business initiatives were made public, such information could prompt investors or
12 potential investors to buy or sell HP stock when they otherwise might not do so,
13 thereby interrupting the ordinary market forces that affect HP's stock price.

14
15 I declare under penalty of perjury that the foregoing is true and correct.

16 Executed this 28 th day of April 2008 at Palo Alto, California.

17 By: 
18 Alexander S Klein III

EXHIBIT 1

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the fiscal year ended: **October 31, 2007**

Or

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from _____ to _____

Commission file number **1-4423**

HEWLETT-PACKARD COMPANY

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of
incorporation or organization)

94-1081436
(I.R.S. employer
identification no.)

3000 Hanover Street, Palo Alto, California
(Address of principal executive offices)

94304
(Zip code)

Registrant's telephone number, including area code: **(650) 857-1501**

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered
Common stock, par value \$0.01 per share	New York Stock Exchange
Liquid Yield Option™ Notes due 2017	

Securities registered pursuant to Section 12(g) of the Act:
None

Indicate by check mark if the registrant is a well-known seasoned issuer as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act.
Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of "accelerated filer and large accelerated filer" in Rule 12b-2 of the Exchange Act.

Large accelerated filer ☒ Accelerated filer ☐ Non-accelerated filer ☐

Indicate by check mark whether the registrant is a shell company (as defined by Rule 12b-2 of the Exchange Act) Yes ☐ No ☒

The aggregate market value of the registrant's common stock held by non-affiliates was \$109,938,540,000 based on the last sale price of common stock on April 30, 2007.

The number of shares of HP common stock outstanding as of November 30, 2007 was 2,573,868,626 shares.

DOCUMENTS INCORPORATED BY REFERENCE
DOCUMENT DESCRIPTION

Portions of the Registrant's notice of annual meeting of stockholders and proxy statement to be filed pursuant to Regulation 14A within 120 days after Registrant's fiscal year end of October 31, 2007 are incorporated by reference into Part III of this Report.

10-K PART

III

Hewlett-Packard Company
Form 10-K
For the Fiscal Year Ended October 31, 2007

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HEWLETT-PACKARD COMPANY AND SUBSIDIARIES
Consolidated Statements of Earnings

	For the fiscal years ended October 31		
	2007	2006	2005
	In millions, except per share amounts		
Net revenue:			
Products	\$ 84,229	\$73,557	\$68,945
Services	19,699	17,773	17,380
Financing income	358	328	371
Total net revenue	104,286	91,658	86,696
Costs and expenses:			
Cost of products	63,435	55,248	52,550
Cost of services	15,163	13,930	13,674
Financing interest	289	249	216
Research and development	3,611	3,591	3,490
Selling, general and administrative	12,226	11,266	11,184
Amortization of purchased intangible assets	783	604	622
In-process research and development charges	190	52	2
Restructuring charges	387	158	1,684
Pension curtailments and pension settlements, net	(517)	—	(199)
Total operating expenses	95,567	85,098	83,223
Earnings from operations	8,719	6,560	3,473
Interest and other, net	444	606	83
Gains (losses) on investments	14	25	(13)
Earnings before taxes	9,177	7,191	3,543
Provision for taxes	1,913	993	1,145
Net earnings	\$ 7,264	\$ 6,198	\$ 2,398
Net earnings per share:			
Basic	\$ 2.76	\$ 2.23	\$ 0.83
Diluted	\$ 2.68	\$ 2.18	\$ 0.82
Weighted-average shares used to compute net earnings per share:			
Basic	2,630	2,782	2,879
Diluted	2,716	2,852	2,909

The accompanying notes are an integral part of these Consolidated Financial Statements.

Exhibit 31.1

CERTIFICATION

I, Mark V. Hurd, certify that:

1. I have reviewed this Annual Report on Form 10-K of Hewlett-Packard Company;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: December 14, 2007

/s/ MARK V. HURD

Mark V. Hurd
*Chairman, Chief Executive Officer and President
(Principal Executive Officer)*

Exhibit 31.2

CERTIFICATION

I, Catherine A. Lesjak, certify that:

1. I have reviewed this Annual Report on Form 10-K of Hewlett-Packard Company;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures, and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: December 14, 2007

/s/ CATHERINE A. LESJAK

Catherine A. Lesjak,
*Executive Vice President and
Chief Financial Officer
(Principal Financial Officer)*

**CERTIFICATION
OF
CHIEF EXECUTIVE OFFICER
AND
CHIEF FINANCIAL OFFICER
PURSUANT TO 18 U.S.C. 1350,
AS ADOPTED PURSUANT TO
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

I, Mark V. Hurd, certify, pursuant to 18 U.S.C. 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Annual Report on Form 10-K of Hewlett-Packard Company for the fiscal year ended October 31, 2007 fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that information contained in such Annual Report on Form 10-K fairly presents, in all material respects, the financial condition and results of operations of Hewlett-Packard Company.

December 14, 2007

By: /s/ MARK V. HURD

Mark V. Hurd
Chairman, Chief Executive Officer and President

I, Catherine A. Lesjak, certify, pursuant to 18 U.S.C. 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Annual Report on Form 10-K of Hewlett-Packard Company for the fiscal year ended October 31, 2007 fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that information contained in such Annual Report on Form 10-K fairly presents, in all material respects, the financial condition and results of operations of Hewlett-Packard Company.

December 14, 2007

By: /s/ CATHERINE A. LESJAK

Catherine A. Lesjak
*Executive Vice President and
Chief Financial Officer*

A signed original of this written statement required by Section 906 has been provided to Hewlett-Packard Company and will be retained by Hewlett-Packard Company and furnished to the Securities and Exchange Commission or its staff upon request.

EXHIBIT 2

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Attorneys for Nonparty
HEWLETT-PACKARD COMPANY

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re IBM 30(b)(6) Deposition Subpoena in the
matter of:

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Plaintiff and Counterclaim
Defendant,

v.

PLATFORM SOLUTIONS, INC.,

Defendant and Counterclaimant.

CASE NO. C07-80174 RMW (PVT)
The Hon. Patricia V. Trumbull

Underlying action pending in the United States
District Court for the Southern District of New
York, CASE NO. CV 06-13565 SCR

**NONPARTY HEWLETT-PACKARD
COMPANY'S NOTICE OF MOTION AND
MOTION TO MODIFY SUBPOENA AND
FOR A PROTECTIVE ORDER; MEMO. OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF; AND [PROPOSED] ORDER
GRANTING MOTION
[REDACTED VERSION PURSUANT TO
L.R. 79-5]**

[Declarations of Angelique Kaounis, Stephen
Howard, and John Pickett and Request for
Judicial Notice in Support hereof filed
concurrently herewith]

Date: June 3, 2008
Time: 10:00 a.m.
Place: Courtroom 5

1 NOTICE IS HEREBY GIVEN that on June 3, 2008, at 10:00 a.m., or as soon thereafter as
 2 counsel may be heard by the above-titled Court, located at 280 South 1st Street, San Jose, CA 95113,
 3 Nonparty Hewlett-Packard Company (“HP”) will, and hereby does move the Court to limit the scope
 4 of the Subpoena for the Deposition of HP served by IBM pursuant to Federal Rules of Civil
 5 Procedure 30(b)(6) and 45 in connection with the underlying action (the “Subpoena”).

6 HP hereby moves this Court, pursuant to Federal Rules of Civil Procedure 26 and 45, for an
 7 order modifying the scope of the Subpoena served by IBM on HP in this action, on the grounds that
 8 the Subpoena: (1) seeks information which is “unreasonably cumulative or duplicative, or can be
 9 obtained from some other source that is more convenient, less burdensome, or less expensive;”
 10 (2) subjects HP to undue burden; and (3) requires disclosure of HP’s trade secret, and/or other
 11 confidential research, development, or commercial information (where equally probative information
 12 is available to IBM from public sources). For these reasons, and because good cause exists, HP
 13 moves this Court for an order that that the discovery be had subject to its objections and only on the
 14 specified terms and conditions as set forth in *HP’s April 17 and 24, 2008 Compromise Offers* (see
 15 *infra*, Memo of Ps. & As., at pp. 4-5 & Exhibits O & Q to the Declaration of Angelique Kaounis
 16 (“Kaounis Decl.”), filed concurrently herewith).

17 This Motion is based on this Notice of Motion and Motion and accompanying Memorandum
 18 of Points and Authorities, the Declarations of Angelique Kaounis, John Pickett, and Stephen Howard
 19 (filed concurrently herewith), HP’s Request for Judicial Notice (filed concurrently herewith), and on
 20 all pleadings and papers on file in this action, and upon such other evidence and arguments as may be
 21 presented to the Court at the time of the hearing.

22 HP hereby certifies that this Motion has been filed after extensive meet and confer efforts
 23 between HP and IBM, which resulted in a significant narrowing of the scope of the Subpoena from
 24 its

25 //

26 //

1 original form, but unfortunately did not conclude with a resolution of all outstanding issues. Kaounis
2 Decl. ¶¶ 18-28.

3 DATED: April 29, 2008

JEFFREY T. THOMAS
ANGELIQUE KAOUNIS
GIBSON, DUNN & CRUTCHER LLP

By: Angelique Kaounis / BMO

Angelique Kaounis

Attorneys for Nonparty
HEWLETT-PACKARD COMPANY

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I. JURISDICTION

This matter arises out of the issuance of a March 10, 2008 subpoena (the “Subpoena”) to nonparty Hewlett-Packard Company (“HP”), in the underlying action entitled *International Business Machines v. Platform Solutions Inc.*, CASE NO. CV 06-13565 SCR (S.D.N.Y.). HP is headquartered at 3000 Hanover St., Palo Alto, CA, and thus, the Subpoena in dispute issued from this Court. Declaration of Angelique Kaounis (“Kaounis Decl.”), ¶ 5 & Exh. A.

II. STATEMENT OF ISSUES

Pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure, nonparty HP requests that the Court issue an order limiting the scope of Plaintiff and Counterclaim Defendant International Business Machines’ (“IBM”) Subpoena in the above-titled matter.¹ Specifically, HP requests that the Court modify the Subpoena and/or enter a protective order limiting the scope of the Subpoena to the specific terms, conditions, and by the method set forth in *HP’s April 17 and 24, 2008 Meet and Confer Offers* and as explained more fully herein. Kaounis Decl. ¶¶ 23 & 27, Exhs. O & Q; *see infra*, at pp. 4-5.

This Court should modify IBM’s Subpoena and/or issue a protective order for several reasons. *First*, the Subpoena is unduly burdensome because the deposition topics set forth in the Exhibit thereto are (a) not adequately tailored to the subject matter of the underlying litigation; and (b) “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive. . . .” *Second*, the Subpoena requires the disclosure of trade secret or other confidential research, development, or commercial information without a sufficient showing of the relevance or need for this information (particularly in light of the fact that there is publicly available information that more than adequately satisfies IBM’s purported need to demonstrate that competition exists between HP and IBM). *Third*, Topic No. 7 of the Subpoena calls for improper expert testimony on an ultimate issue in the case, where equally probative information is available

¹ All references to “Rules” herein are to the Federal Rules of Civil Procedure unless otherwise noted.

from less burdensome sources. For these reasons, the Court should modify the Subpoena and/or grant HP's request for a protective order.

III. STATEMENT OF FACTS

This discovery dispute arises out of an action between IBM and Platform Solutions Inc. ("PSI"), currently pending before the District Court for the Southern District of New York. Kaounis Decl., Exhs. B & C; Request for Judicial Notice (filed concurrently herewith ("RJN")). In that action, IBM contends that PSI uses IBM's software in a manner that breaches an agreement between the parties and infringes several patents held by IBM. Kaounis Decl., Exh. B, ¶¶ 5-6. Specifically, IBM alleges that "PSI has developed and is . . . offering for sale computer systems ('emulator systems') that seek to imitate IBM's computers." *Id.* at Exh. B, ¶ 2. IBM claims that PSI's emulator systems "translate IBM's object code and [] store the object code translations for execution on a computer using an Itanium processor" in a manner that violates IBM's Customer Agreement ("ICA") with PSI and also infringes IBM's patents. *See, e.g., id.* at Exh. B, ¶¶ 70, 74-79.

In response to these allegations, PSI has asserted counterclaims alleging that IBM's software licensing practices violate sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act, and further, that IBM has allegedly interfered with PSI's prospective economic relationship(s). *Id.* at Exh. C, *Counterclaims*, ¶¶ 114-138; 152-57. PSI claims that the "relevant markets in th[e] case are the markets for IBM-compatible mainframe computers and IBM-compatible operating systems." *Id.* at ¶ 20.

HP has ongoing business relationships with both parties to the lawsuit, but is not a party to the underlying litigation. Kaounis Decl., ¶ 7. Among other things, PSI is an authorized reseller of HP Integrity Servers, and HP and IBM are parties to a patent cross-licensing agreement. *Id.* In light of its nonparty status, and in recognition of these relationships, HP has continuously cooperated with both IBM and PSI throughout their litigation. Indeed, over the last year, *HP has been served with seven separate subpoenas for documents and testimony*, and has produced nearly 25,000 pages of documents, as well as an extensive privilege log. Kaounis Decl., ¶ 8.

On February 14, 2008, HP received a letter from IBM stating that it intended to seek the 30(b)(6) deposition of HP and providing a proposed list of deposition topics. Kaounis Decl., ¶ 9,

Exh. D. Immediately upon receipt of the letter, HP began investigating who would be appropriate person(s) to provide testimony on the various proposed topics outlined in the letter. *Id.* at ¶ 10. Shortly thereafter, on February 19, 2008, HP replied to IBM's letter and indicated that HP found a number of the topics outlined in IBM's proposal to be overbroad and otherwise objectionable. *Id.* at ¶ 11, Exh. E. HP requested that IBM tailor its Subpoena as narrowly as possible, keeping in mind that HP is a nonparty that already produced substantial documentation in the case. *Id.*

In response, on February 21, 2008, IBM requested that *HP provide IBM* with "HP's proposed narrowing of the scope of the Subpoena, so that IBM has a starting point from which to consider re-tailoring our proposed list of topics." Kaounis Decl., ¶ 12, Exh. F. HP declined to undertake this burden in an email dated February 26, 2008, pointing out that "[g]iven [HP's] lack of familiarity with what others already have produced, and the depositions that IBM has already taken, [HP] think[s] it would be more efficient if IBM would articulate the specific categories of testimony *it believes it needs from HP.*" *Id.* at ¶ 13, Exh. G. (emphasis added).

Despite HP's request, IBM again tried to foist the burden of narrowing the scope of its Subpoena onto nonparty HP, arguing in a February 29, 2008 letter that "HP is clearly in the best position to assess what information it possesses. . . ." and requesting "that HP propose[] what it believes is a list of topics that is not 'overbroad.'" Kaounis Decl., ¶ 14, Exh. H. Then, on March 5, 2008 HP again requested, given IBM's familiarity with its own case, that IBM tailor its proposed list of topics and once again offered to meet and confer about the scope of the revised categories. *Id.* at ¶ 15, Exh. I. IBM responded on March 7, 2008 reasserting its position that it was HP's burden to revise IBM's proposed topics. *Id.* at ¶ 16, Exh. J.

On March 10, 2008, IBM served HP with its Rule 30(b)(6) Subpoena. Kaounis Decl., ¶ 17 & Exh. A. Rather than narrowing the scope of the Subpoena topics pursuant to HP's repeated requests, IBM issued a Subpoena that contained the exact same set of 13 categories set forth in IBM's letter of February 14, 2008. *Id.* at ¶ 17 & Exhs. A & D. Additionally, the Subpoena did not have any temporal or geographic limitations, despite the fact that HP had notified IBM of this deficiency in its prior letters. *Id.* at ¶ 17 & Exh. A. Nevertheless, HP promptly contacted IBM on March 17, 2008 and proposed that the parties work together "to negotiate the scope of HP's response to the

subpoena.” *Id.* at ¶ 18, Exh. K. After over a month of meeting and conferring, the parties were able to agree (with the exception of the temporal scope of the topics and Topic No. 7) to the below set of compromises:

1. [IBM’s Initial Request]: HP’s relationship with PSI, including but not limited to HP’s communications and/or dealings with PSI, HP’s objectives in communicating and/or dealing with PSI, HP’s technical assistance to PSI, and any partnership, whether formal or informal, between HP and PSI.
2. [IBM’s Initial Request] **REDACTED REDACTED** without limitation, the reasons I **REDACTED REDACTED** [Compromise for Topic Nos. 1 and 2 (proposal is for testimony unless other noted)]:
 - The general **REDACTED REDACTED REDACTED REDACTED**
 - At a general level (not client-by-client), the extent to which HP provided technical support and/or marketing in support of PSI’s solution, if at all, during 2003-2006.
 - HP’s overall strategy, if any, regarding the use of PSI’s solution to enhance HP’s competitive position against IBM in marketing mainframe alternatives in 2003-2006.
 - A declaration regarding the technical assistance that HP provided to PSI during the development of its solution.
3. [IBM’s Initial Request]: HP microprocessors sold for use in servers that compete with IBM’s zSeries servers and S/390 servers, including, without limitation, the processing power, cost and capabilities of such microprocessors and the customers that use such microprocessors.²
4. [IBM’s Initial Request]: HP’s Mainframe Alternative Consolidation solutions.
5. [IBM’s Initial Request]: HP’s marketing of and participation in mainframe migration strategies.
6. [IBM’s Initial Request]: Actual or potential competition for customers and workloads between IBM z/Series and/or S/390 computer servers and computer servers incorporating HP microprocessors.
7. [IBM’s Initial Request]: Whether and to what extent HP believes that end-users of IBM mainframes are "locked-in" to continued use of IBM mainframes, including, without limitation, the reason(s) any such lock-in exists; the specific end users whom HP believes are "locked-in;" and HP’s response to claims that end users of IBM mainframes are "locked-in."³

² Because HP does not manufacture microprocessors, Topic No. 3 (as well as Nos. 6 and 8), calls for information that should be obtained from the manufacturers of the microprocessors at issue. In recognition of this fact, during the meet and confer process, IBM “clarified” this request to instead seek ““testimony regarding actual or potential competition faced by HP’s servers, particularly insofar as they compete with IBM’s zSeries and S/390 servers.” Kaounis Decl., Exh. M. As re-worded, this topic covers the same subject matter as Topic No. 6.

³ With regard to Topic No. 7, HP continues to believe that this is an inappropriate Topic because it essentially asks HP to give expert testimony on an ultimate issue in this case. This topic is more fully discussed *infra* at pp. 16-18.

8. [IBM's Initial Request]: The success of HP and OEMs in marketing servers incorporating HP microprocessors to enable partial or total migration of workloads off of IBM mainframes.⁴
[Compromise for Topic Nos. 3, 4, 5, 6, 7, and 8]:⁵
- The general purpose and operation of HP's mainframe alternative solutions program during 2003-2006, including a general discussion of whether HP believes it competes or does not compete with IBM's z/series and s/390 servers.
 - HP's general understanding of the conditions during 2003-2006 that made migration off of IBM mainframes more or less challenging.
9. [IBM's Initial Request]: HP's present and past use of IBM and/or IBM-compatible mainframes; the extent to which HP has moved its workloads off of IBM and/or IBM-compatible mainframes to other platforms, and whether and to what extent HP concluded that it was incapable of migrating any workloads that it was running on IBM mainframes or IBM-compatible mainframes to other platforms.
[Final Compromise]: IBM has agreed to table this topic.
10. [IBM's Initial Request]: The Itanium Solutions Alliance ("ISA"), including, without limitation, the objectives of the ISA and HP's role in founding, promoting, and/or participating in the ISA.
[Final Compromise]: HP will produce a written response that describes HP's role in promoting, and/or participating in the ISA in 2005-2006.
11. [IBM's Initial Request]: The Mainframe Migration Alliance ("MMA"), including, without limitation, the activities or objectives of the MMA and HP's role in founding, promoting and or participating in the MMA.
[Final Compromise]: IBM has withdrawn this topic.
12. [IBM's Initial Request]: Any documents relating to this action.
[Final Compromise]: HP has agreed to assist with the authentication of a reasonable number of documents.
13. [IBM's Initial Request]: The five persons at HP most knowledgeable concerning each of the foregoing topics.
[Final Compromise]: IBM has withdrawn this topic.

⁴ Topic No. 8, in part, pertains to information from wholly separate legal entities, and thus, IBM rightfully should seek discovery from those parties rather than HP. In apparent recognition of this fact, IBM has withdrawn the portion of Topic No. 8 that relates to other OEMs. Kaounis Decl., Exh. M, at 4.

⁵ In light of the extreme overbreadth of Topic Nos. 4-6, the parties specifically agreed that an HP witness would not testify as to the granular or specific client-related details of these topics, and would not be expected to discuss specific communications, documents, components of HP's mainframe alternative solutions, or client or ISV relationships. Rather, HP's witness might be asked to comment on whether a particular communication, document, component, or relationship would be consistent or inconsistent with HP's understanding and strategy at a broader level. Kaounis Decl., ¶ 23, Exh. O.

1 Kaounis Decl., Exhs. O, P & Q.

2 Though HP and IBM have agreed to the general subject matter scope of the above-listed
3 topics (with the exception of No. 7 as noted and discussed herein), IBM would not agree to narrow
4 the temporal scope of the Subpoena to a reasonable and relevant time period (2003-2006) as
5 requested by HP. *Id.* at ¶¶ 24-28; Exhs. O, P, Q, & R. Accordingly, HP was forced to bring this
6 motion to seek the Court's assistance.

7 **IV. ARGUMENT: THE COURT SHOULD MODIFY THE SUBPOENA OR GRANT A** 8 **PROTECTIVE ORDER**

9 Because the Current Motion addresses a 30(b)(6) deposition subpoena, this Court should
10 evaluate the propriety of that Subpoena under Rules 26, 30, and 45 of the Federal Rules of Civil
11 Procedure. Under these Rules, it is clear from the face of the Subpoena that as issued, it was overly
12 broad and subjected HP to an undue burden. Indeed, rather than taking "reasonable steps to avoid
13 imposing undue burden or expense" on HP, as required by Rule 45, IBM instead issued a Subpoena
14 that was so overbroad that it took over a month to narrow its scope to an *almost* manageable set of
15 topics. Fed. R. Civ. P. 45(c)(1).

16 Under circumstances such as those here, Rules 26 and 45 require relief. For example,
17 pursuant to Rule 45, the Court "must quash or modify a subpoena that . . . subjects a person to undue
18 burden." Fed. R. Civ. P. 45(c)(3)(A)(iv); *see Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 636-38 (C.D.
19 Cal. 2005) (quashing Rule 45 subpoena because it "impose[d] an 'undue burden' on nonparty KSA");
20 *Google v. Gonzales*, 234 F.R.D. 674, 680 (N.D. Cal. 2006). Similarly, Rule 26 provides that "the
21 court *must* limit the frequency or extent of discovery otherwise allowed by these rules or by local rule
22 if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be
23 obtained from some other source that is more convenient, less burdensome, or less expensive. . . ."
24 Fed. R. Civ. P. 26(b)(2)(C)(i) (emphasis added).

25 Even assuming however, that the Court does not find that Subpoena is so overbroad as to
26 *mandate* modification, Rules 26 and 45 still provide the Court with broad discretion to modify a
27 subpoena or to issue a protective order limiting the requested discovery. Fed. R. Civ. P. 45(c); Fed.
28 R. Civ. P. 26(c); *see Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 779 (9th Cir. 1994)

(“Rule 26(c) and Rule 45(c)(3) give ample discretion to district courts to quash or modify subpoenas causing “undue burden.”). For instance, Rule 45 authorizes a court to modify a subpoena “if it requires . . . disclosing a trade secret or other confidential research, development, or commercial information.” Fed. R. Civ. P. 45(c)(3)(B)(i); *Mattel Inc. v. Walking Mtn. Products*, 353 F.3d 792, 813-14 (9th Cir. 2003) (upholding District Court’s quashing of an unduly burdensome nonparty 30(b)(6) subpoena that sought information about the nonparty’s intellectual property). In addition, upon a showing of “good cause” Federal Rule of Civil Procedure 26(c)(1) provides that the court may “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including by way of:

(A) forbidding the discovery or disclosure;

(B) specifying terms . . . for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; . . .[and]

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way[.]

Fed. R. Civ. P. 26(c)(1)(A-D, G).

Here, as set forth below, this Court should modify IBM’s Subpoena or issue a protective order and limit the Subpoena to: (1) the time period 2003-2006; and (2) the topics set forth in HP’s [Proposed] Order (*see also supra*, pp. 4-5, *Compromises*), because the Subpoena is unduly burdensome, seeks information that is readily available from more convenient sources, and would require disclosure of HP’s trade secret or other confidential research, development, or commercial information without a sufficient showing of the relevance of or need for this information (particularly in light of the fact that equally probative information is available from public sources).

A. IBM’s Subpoena is Overly Broad and Unduly Burdensome

Generally, “what constitutes an undue burden in a given instance is a case specific inquiry.” *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 53 (S.D.N.Y. 1996). However, under Rule

45, “non-party status is a significant factor a court must consider when assessing undue burden for the purpose of a Rule 45 motion.” *WM High Yield v. O’Hanlon*, 460 F. Supp. 2d 891, 895-96 (S.D. Ind. 2006). Indeed, “the status of a person as a non-party is a factor that weighs against disclosure.” *Am. Elec. Power Co.*, 191 F.R.D 132, 136 (S.D. Oh. 1999) (emphasis added); *see Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980) (noting that discovery restrictions “may be broader when a nonparty is the target of discovery”); *Concord Boat Corp.*, 169 F.R.D. at 49 (“[T]he status of a witness as a non-party to the underlying litigation ‘entitles [the witness] to consideration regarding expense and inconvenience.’”) (citing Fed. R. Civ. P. 45(c)). In recognition of this, the Ninth Circuit has noted that “(t)here appear to be quite strong considerations indicating that discovery would be more limited to protect third parties from harassment, inconvenience, or disclosure of confidential documents.” *Dart Indus. Co.*, 649 F.2d at 649 (“[T]he word nonparty serves as a constant reminder of the reasons for the limitations that characterize ‘third-party’ discovery.”) (citations omitted).

1. The Subpoena reaches well beyond the relevant aspects of HP’s relationship with PSI and the subject matter of the underlying litigation.

Rule 30(b)(6) squarely places the burden on the party seeking testimony to identify “with reasonable particularity the matters for examination.” Fed. R. Civ. P. 30(b)(6); *see Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002). Despite this plain requirement, even a cursory review of IBM’s Subpoena reveals that none of the topics are stated with sufficient particularity to satisfy Rule 30(b)(6), because they: (1) contain no geographic or temporal limitations (and even as narrowed to the time period 2003 to the present are overbroad); and (2) are so broadly worded that they reach well beyond the permissible scope of discovery in the underlying action. *See, e.g., Moon*, 232 F.R.D. at 637-38 (finding four of the seven requests at issue “overbroad on [their] face and exceed[ing] the bounds of fair discovery” where they sought “(a) information over a ten year or greater period and (b)...information regarding *all* pool winter covers, not only those ‘within the Far East Region’”); *see also WM High Yield*, 460 F. Supp. 2d at 896 (holding that the requests were “overly broad” where, among other things, they sought “information over either an unlimited period of time or, when limited, over seven years”). Because these topics are overbroad and seek irrelevant

information and/or information that can be more easily obtained from other sources, they impose an undue burden on HP and must be narrowed. *Google*, 234 F.R.D. at 680 (“Overbroad subpoenas seeking irrelevant information may be quashed or modified.”).

a. Post-2006 information regarding PSI.

Without any reasonable justification for its overly expansive requests, IBM has sought deposition testimony on a series of topics that go well beyond the relevant aspects of HP’s relationship with PSI. For example, Topic No. 1 seeks testimony from *2003 to the present* regarding “HP’s relationship with PSI, including but not limited to HP’s communications and/or dealings with PSI, HP’s objectives in communicating and/or dealing with PSI, HP’s technical assistance to PSI, and any partnership, whether formal or informal, between HP and PSI.” Kaounis Decl., Exh. A. This, despite the facts that: (1) in October 2006, HP REDACTED (2) after October 2006, PSI only acted as an authorized reseller of HP hardware and member of HP’s Developer & Solution Partner Program (DSPP) (Declaration of Stephen Howard (“Howard Decl.”), ¶¶ 4-5); (3) PSI’s counterclaims were filed in January 2007 and thus relate to conduct that occurred prior to that time (Kaounis Decl., Exh. U); and (4) in late 2007, PSI entered into a reseller agreement for “Mainframe Class” servers with a different technology company—NEC (*Id.*, Exh. T).

Neither PSI’s current status as an authorized reseller of HP’s server products, nor its status as a DSPP member elevate it to any heightened level of strategic significance in connection with HP’s mainframe alternative offerings or its potential competition with IBM. Howard Decl., ¶¶ 5, 8; Pickett Decl., ¶ 5. Rather, PSI’s reseller status simply means that it has a contractual agreement with HP to sell certain HP products and services in a particular geographic area for a specified period of time. Howard Decl., ¶ 6. HP’s reseller agreement with PSI *does not establish a franchise, partnership, joint venture, or agency relationship between HP and PSI in connection with the agreement. Id.* Likewise, HP’s DSPP program—by which it offers resources to software vendors and software developers seeking to develop and demonstrate their software on HP hardware—also contains similar

1 limitations. *Id.* at ¶ 7.⁶ And, DSPP membership status does mean that a particular company is part of
 2 any strategic HP initiative. *Id.* at ¶ 8. In fact, once REDACTED REDACTED
 3 PSI just as it would any other authorized reseller of HP servers. *Id.* at ¶ 5.

4 Despite this, IBM insists that it is entitled to testimony regarding HP's relationship with PSI
 5 for the time period 2007-2008. But *IBM has made no showing why any post-2006 information is*
 6 *relevant in light of HP's current relationship with PSI.* For example, IBM has not demonstrated how
 7 this limited relationship might speak to PSI's or HP's competitive strength vis-à-vis IBM—because it
 8 cannot. Indeed, in light of the fact that PSI has now teamed up with a third party (NEC) to market
 9 and sell a mainframe alternative solution, any post-2006 testimony regarding this subject is more
 10 appropriately directed at those companies. Accordingly, HP should not be required to prepare a
 11 witness regarding its post-2006 relationship with PSI. *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894
 12 F.2d 1318, 1328 (Fed. Cir. 1990) (affirming District Court's quashing of a 30(b)(6) deposition
 13 subpoena for requesting discovery on irrelevant topics and noting that "[a] litigant may not engage in
 14 merely speculative inquiries in the guise of relevant discovery").

15 **b. Post-2006 information regarding HP's mainframe alternative solutions,**
 16 **migration strategies, and efforts to compete against IBM.**

17 Many of IBM's Subpoena topics also reach well beyond the subject matter of the underlying
 18 litigation. For example, Topic Nos. 4, 5, and 6 appear to be a fishing expedition aimed at probing the
 19 entirety of: (1) HP's mainframe alternative consolidation solutions; (2) HP's mainframe migration
 20 strategies; and (3) HP's efforts to compete for customers who use the IBM z/Series and/or S/390
 21 computer servers, *without regard to whether this information relates to PSI or the claims in the*
 22 *underlying litigation.* But, as discussed herein, HP's mainframe alternative business encompasses a
 23 myriad of different solutions, of which PSI was only a very small part. Pickett Decl., ¶¶ 3-5.

24
 25
 26 ⁶ During the time period 2006 to the present, HP has been a party to channel partner agreements
 27 with thousand of companies. Howard Decl., ¶ 4. Similarly, HP has DSPP agreements with
 28 companies in close to 100 countries in numerous industries and has thousands of partners that
 provide server-related technologies. *Id.* at ¶ 8.

HP markets a wide range of mainframe alternative solutions that encompass several different types of servers, dozens of other hardware and software components, and are coupled with services and/or offerings from one or more of its many Independent Software Vendor (ISV) partners (*of which PSI is not listed as one*). Pickett Decl., ¶ 3; Exh. B, at 10. HP markets these solutions to suit the needs of its various customers by offering to (1) augment existing mainframe solutions; (2) modernize clients' infrastructures; and/or (3) modernize clients' applications. Pickett Decl., at ¶ 3. Similarly, HP's mainframe migration strategy is a multi-faceted program that encompasses numerous HP offerings such as servers, storage, HP's BladeSystem, and HP IT services, and includes migration services from pre-planning and assessment to post-migration follow-up, porting, application modernization services, and virtualization services. Pickett Decl., ¶ 4 & Exh. B. Because these services are so customized, and by necessity, will vary depending on the type of system from which data is being migrated—*e.g.*, Sun or IBM—often experts for each of the various components must work with the sales personnel who are responsible for the particular client relationship to tailor an offering best suited to that client's needs. Pickett Decl., at ¶¶ 3-4.⁷

PSI is an authorized reseller of HP Integrity Servers, which is only one of the many different types of servers sold by HP in connection with its mainframe alternative offerings. Pickett Decl., ¶¶ 3, 5. Throughout PSI's and HP's relationship, PSI has only sold its solution on HP hardware to fewer than five customers, and all of these sales occurred prior to the end of 2006. *Id.* at ¶ 5. **More importantly, however,** because PSI was HP's last connection to any mainframe alternative solution which ran in connection with an IBM operating system, **any mainframe alternative solution offered on HP hardware since the end of 2006 has been on an HP operating system.** *Id.* Thus, HP's post-2006 solutions *fall outside the definition of the relevant market as defined by PSI—i.e.*, the "IBM-compatible mainframe computers and mainframe operating systems." *See* Kaounis Decl., Exh. C, at *Amended Counterclaims*, ¶ 20. On this record, IBM simply cannot demonstrate that all of HP's mainframe alternative solutions and mainframe migration strategies **from 2003 to the present**

⁷ The general topic of competition with IBM z/series mainframes and z/OS is interrelated with both Topic Nos. 4 and 5, so it is not discussed separately in this Motion.

are relevant to the instant litigation.⁸ See *Garner Constr. Inc., v. Int'l Union of Operating Engineers*, 2007 U.S. Dist. LEXIS 92522 at *5 (W.D. Wash. Dec. 4, 2007) (denying motion to compel documents that related only to the subpoenaed non-party's business operations apart from any connection to the parties to the underlying litigation); *Mattel*, 353 F.3d at 813 (upholding district court's quashing of a non-party subpoena where "no attempt had been made to try to tailor the information request to the immediate needs of the case").

Even assuming, *arguendo*, that all of HP's mainframe alternative solutions and migration strategy programs were relevant (which HP does not concede), it would be excessively burdensome for HP—a nonparty—to prepare a 30(b)(6) witness to address every aspect of these programs from 2003 to the present because these topics are so broad. Compare Pickett Decl., ¶¶ 2-5 (referencing the dozens of teams associated with HP's *worldwide* mainframe alternative solutions program and the numerous aspects of the program), with *Concord*, 169 F.R.D. at 53 (holding that Subpoena was unduly burdensome because compliance with its terms "would subject numerous Merrill Lynch employees and managers in several branch offices to countless hours of research, analysis, and compilation"). Accordingly, as a reasonable compromise, HP agreed to provide a witness (or witnesses) regarding:

- The general purpose and operation of HP's mainframe alternative solutions program during 2003-2006, including a general discussion of whether HP believes it competes or does not compete with IBM's z/series and s/390 servers.
- HP's general understanding of the conditions during 2003-2006 that made migration off of IBM mainframes more or less challenging.

Kaounis Decl., Exhs. O & Q. Any further deposition testimony on these subjects should be denied.

⁸ IBM's own documents show that it focuses its competitive efforts against HP's Integrity server, the types of machines that PSI resells in connection with its mainframe alternative solution. Kaounis Decl., ¶ 29, Exh. S. What could be better evidence of competition in the antitrust case against IBM than its own materials acknowledging the same and providing detailed comparisons of allegedly relevant products? See generally, *ACT, Inc. v. Sylvan Learning Sys., Inc.*, 1999-1 Trade Cas. (CCH) P72,527, 1999 U.S. Dist. Lexis 7055, *8-9 (E.D.P.A. May 14, 1999).

B. The Subpoena Seeks Testimony Regarding Information that is Available from Less Burdensome Sources.

Rule 26(b)(2)(C)(i) requires a court to limit discovery when it is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive....” *Id.*; see *WM High Yield*, 460 F. Supp. 2d at 896 (quashing nonparty subpoena because subpoenaing party failed to show that the information it sought was unavailable from other sources); see also *Haworth v. Miller*, 998 F.2d 975, 978 (Fed. Cir. 1993) (“[T]his court has noted that the need for discovery in an ancillary proceeding ‘is diminished when the information is available elsewhere.’”) (internal citation omitted). Here, IBM seeks two types of information—highly confidential proprietary HP product and strategy information from 2007-2008, and information that is tantamount to expert testimony—which is more readily available through other less burdensome sources. Thus, the Court should quash these portions of IBM’s Subpoena.

1. The Subpoena seeks disclosure of HP’s trade secrets and/or confidential, proprietary information where *equally probative information* is available from a public source.

Federal Rule of Civil Procedure 45(c)(3)(B) was intended to provide protection for the intellectual property of nonparties. See *Mattel*, 353 F.3d at 814 (citing Rule 45’s Advisory Committee Notes (1991)); see also *Micro Motion*, 894 F.2d at 1323 (“Confidential commercial information warrants special protection under Rule 26(c)(7)”). Here, even though the parties have negotiated a protective order (Kaounis Decl., ¶ 6), IBM should still be required to make the requisite Rule 45(c) showing of “substantial need” that cannot be met without “undue hardship” in order to discover HP’s confidential, proprietary and/or trade secret material regarding its post-2006: (1) mainframe alternative solutions program; (2) migration strategies; and (3) competitive efforts against IBM. *Cacique, Inc. v. Robert Reiser & Co.*, 169 F.3d 619, 622-23 (9th Cir. 1999) (noting that a protective order does not dispense with the requirement to establish relevance or need—its purpose “is to prevent harm by limiting disclosure of *relevant* and *necessary* information”); *Insulate America v. Masco Corp.*, 227 F.R.D. 427, 434 (W.D.N.C. 2005); see also Fed. R. Civ. P. 45, Advisory Committee Notes, 1991 Amendment (“In instances where a subpoena requires disclosure of a trade secret or other confidential or commercially sensitive information it ‘should be quashed unless the

1 party serving the subpoena shows a substantial need and the court can devise an appropriate
 2 accommodation to protect the interests of the' party opposing such potentially harmful disclosure.”).
 3 Indeed, “[t]here is a constant danger inherent in disclosure of confidential information pursuant to a
 4 Protective Order. Therefore, the party requesting disclosure must make a strong showing of need,
 5 especially when confidential information from a non-party is sought.” *Insulate Am.*, 227 F.R.D. at
 6 434 (citation omitted).

7 IBM cannot demonstrate a substantial need for HP’s *current* (2007-2008) *confidential* market
 8 and strategy-related information relating to its mainframe alternative solutions, migration strategies,
 9 and competitive efforts against IBM. *First*, requiring disclosure of this type of valuable confidential,
 10 proprietary and/or trade secret information to a formidable competitor such as IBM could cause
 11 serious competitive injury to HP, because if IBM were to learn what HP’s current and future
 12 mainframe alternatives and migration strategies entail, it could alter its own strategies to preempt
 13 solutions that HP has or will offer in the market. Pickett Decl., ¶¶8-9; *see In re Vitamins Antitrust*
 14 *Litig.*, 267 F. Supp. 2d 738, 741-42 (D. Ohio 2003) (granting motion to quash where: (1) it seemed
 15 clear that Aventis was requesting trade secrets—“the lifeblood of [the nonparty’s] financial well
 16 being[;]” (2) certain of the defendants in the antitrust litigation were nonparty’s “direct competitors,
 17 [which] only heighten[ed] the Court’s first concern[;]” (3) the Court had “no enforcement power over
 18 the extant protective order, and thus would be unable to protect [the nonparty’s] interests were its
 19 terms to be breached[;]” and (4) there was a possibility that the records would be irrelevant if certain
 20 motions in the underlying case were granted).

21 *Second*, the non-confidential aspects of these subjects are plainly described on HP’s website,
 22 and thus, if IBM needs to demonstrate: (1) that HP attempts to compete with IBM by providing
 23 mainframe alternative solutions; or (2) that HP attempts to migrate customers off of IBM mainframes
 24 and onto HP hardware, that information is publicly available. *See* Pickett Dec., ¶ 7 & Exh. B,
 25 http://h71028.www7.hp.com/enterprise/cache/151824-0-0-225-121.html?jumpid=reg_R1002_USEN
 26 (noting that “the mainframe is now oftentimes viewed as a costly and inflexible solution that can no
 27 longer support the needs of organizations that must adapt quickly to the ever-changing
 28 marketplace”); Exh. C, <http://h71028.www7.hp.com/enterprise/cache/564549-0-0-225-121.html>

(entitled “Migrate from IBM mainframes to HP”); Exh. A, <http://www.hp.com/go/offmainframes> (providing links to numerous articles and interviews with HP personnel on a series of topics related to HP’s mainframe alternative solutions and HP’s migration strategies, including a general discussion of the advantages of migrating to HP and case studies of migration). HP offered to provide a witness who could speak to this publicly available information, and also offered to authenticate these web pages. Kaounis Decl., ¶ 27, Exh. Q. IBM refused this offer, yet it has not articulated why *HP’s confidential information* is relevant and necessary to defend against PSI’s claims, and *why the publicly available information is insufficient to serve this purpose*.⁹ *Id.* at ¶ 27, Exh. R. Accordingly, “in the absence of some showing by [IBM] that the publicly available information . . . is inadequate, the burden that production would place on [HP] is unreasonable, particularly in light of [HP’s] nonparty status.” *Allen v. Leibinger*, 190 F.R.D. 518, 525 (W.D. Tenn. 1999).

Additionally, on these points, the case of *ACT, Inc. v. Sylvan Learning Sys., Inc.*, 1999-1 Trade Cas. (CCH) P72,527, 1999 U.S. Dist. Lexis 7055 (E.D.P.A. May 14, 1999), is also instructive. In *ACT*, a plaintiff in an antitrust case (in which violations of Section 2 of the Sherman Act had been alleged) sought discovery from a non-party, ASI, which was the third largest player in the market behind the plaintiff (ACT) and defendant (Sylvan) in that case. *ACT* contained allegations strikingly similar to this case—ACT claimed, among other things, that “Sylvan, by far the largest player in this alleged . . . market, has tortiously interfered with several existing or prospective contractual relationships between ACT and potential clients and business partners that would have helped ACT establish itself in this market.” *Id.* at *1-2. ACT accordingly sought discovery from ASI relating to its “efforts to enter the computer-based testing market, perspectives of the players in that market, assessment of potential and existing competitors, evaluations of competitive conditions, discussions of the risks of entering into the market, and analyses of the barriers to entering that market...” *Id.* at *2. In response, ASI, while acknowledging that the subpoenaed information was “‘marginally’

⁹ IBM states that “given the topics we have identified and the level of specificity that IBM will pursue” IBM strongly suspects that “disputes regarding confidentiality will not arise.” Kaounis Decl., ¶ 26, Exh. P. Despite this hollow assurance, IBM is unwilling to limit the scope of its 2007-2008 inquiries to public information. *Id.*

relevant,” argued that it was “confidential commercial information,” and that “disclos[ure of] this information to its much larger competitors would cause it serious commercial harm and allow its direct competitors to free ride on its own investment in assessing the CBT market.” *Id.* at *7-8. The court quashed the subpoena in large part because ACT was unable to demonstrate a “substantial need” for the information where it did “not deny that similar market assessment information [wa]s available from its own resources,” from the defendant, and from other third party researchers. *Id.* at *8-9.

In light of *ACT*, and considering: (1) the highly confidential nature of HP’s strategies and technology (*see* Pickett Decl., ¶¶8-9); (2) the dubious relevance of the information sought by IBM’s Subpoena topics; (3) the fact that there is ample information on HP’s website which speaks to these subjects (and HP’s offer to authenticate this material for IBM); and (4) HP’s offer to produce a witness on the general topics to the extent that IBM limited its inquiry to public information, IBM has not made—and cannot make—the requisite showing that it has “*a substantial need for the testimony or material that cannot be otherwise met without undue hardship.*” Fed. R. Civ. P. 45(c)(3)(C)(i) (emphasis added); *Insulate America*, 227 F.R.D. at 432 (quashing subpoena requests which sought information from a competitor and noting that “[e]ven if the information sought is relevant, discovery is not allowed where no need is shown, or where compliance is unduly burdensome, or where the potential harm caused by production outweighs the benefit”).

2. The Subpoena seeks improper expert testimony where such information is available from a less burdensome source.

Topic No. 7 of IBM’s Subpoena calls for testimony regarding ultimate issues in the underlying case and seeks to elicit what should be classified as expert testimony. Specifically, Topic No. 7 seeks an HP witness to testify regarding:

Whether and to what extent HP believes that end-users of IBM mainframes are ‘locked-in’ to continued use of IBM mainframes, including, without limitation, the reason(s) any such lock-in exists; the specific end users whom HP believes are ‘locked-in’ and HP’s response to claims that end users of IBM mainframes are ‘locked-in.’

Kaounis Decl., Exh. A, at No. 7. This topic is improper and unduly burdensome because (1) it runs afoul of Rule 26’s prohibition on contention-related depositions; and (2) it attempts to convert a

30(b)(6) witness into a testifying expert under Rule 26. *See generally, Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC*, 227 F.R.D. 421, 426-27 (M.D.N.C. 2005) (suggesting that a court should “give extra consideration to the objections of a non-party, non-fact witness in weighing burdensomeness versus relevance”).

In fact, this Topic simply lifts allegations straight out of PSI’s counterclaims, which allege:

- “Consumers have invested over a trillion dollars in IBM-compatible software and hardware [and] are *now “locked in” to using IBM-compatible software and hardware.*” Kaounis Decl., Exh. C, at *Amended Counterclaims*, ¶ 4 (emphasis added).
- “[T]here are no reasonable substitutes for IBM-compatible mainframes for a substantial and *well-defined subset of mainframe customers who are “locked in” to the IBM platform* based on their prior hardware/software purchasing decisions and their relatively high data processing demands. . . . Such enormous investment in IBM-compatible software has effectively *locked in* many consumers to IBM-compatible mainframe computer systems” *Id.* at ¶ 23 (emphasis added).
- “To switch to a non-IBM-compatible mainframe computer system, *locked in consumers would need to expend enormous amounts of time, money, and other resources.*” *Id.* at ¶ 24 (emphasis added).
- “Even if they had comparable data processing and other performance capabilities, *computers that principally run UNIX, Linux, or Windows operating systems are not reasonable substitutes because “lock-in” effects prevent customers from choosing products that are not compatible with their existing mainframe operating systems and applications. . . .*” *Id.* at ¶ 25 (emphasis added).

By phrasing Topic No. 7 in the exact language of PSI’s allegations, IBM is asking HP, as a corporation (and a competitor), to opine on an ultimate issue in the antitrust case between IBM and PSI—*i.e.*, whether “end-users of IBM mainframes are ‘locked-in’ to continued use of IBM mainframes.” This is an improper question for *any* lay witness, let alone a 30(b)(6) witness testifying on behalf of an antitrust defendant’s non-party competitor, because it requires the witness to reach a conclusion based on specialized knowledge of the factors that prevent certain entities from switching from one computer system to another. *See* Fed. R. Evid. 704 Commentary (“Rule 704 was not intended to allow experts to offer opinions embodying legal conclusions.”); *see also Indem. Ins. Co. of N. Am.*, 227 F.R.D. at 426 (noting the potential impropriety of calling on a “non-party to formulate opinions or contentions regarding the cause of the accident...”).

Furthermore, for HP to properly prepare a witness on this topic, it would be required to investigate whether any of the *hundreds of clients or potential clients* to which it has marketed a mainframe alternative solution in 2003-2008 has ever complained of being locked-in to an IBM mainframe.¹⁰ Rather than impose this burden on HP, IBM can simply elicit the information it needs *for its experts to answer this question* by asking HP (and others): (1) general questions related to the ease of migration; and (2) whether HP (or others) believe that they are capable of competing for certain types of workloads or applications that run on IBM mainframes. *See ACT, Inc.*, 1999 U.S. Dist. Lexis 7055 at *9 (noting in response to plaintiff's antitrust expert's statements that "that the information sought is the type of information upon which experts such as himself rely in analyzing antitrust issues such as those [] raise[d]," that "similar market assessment information [wa]s available from [the requesting party's] own resources, from [the defendant], and from third parties"). Moreover, because IBM has made no showing that the available information is inadequate for its needs, the Court should not require HP to answer questions on this specific topic.

V. CONCLUSION

HP respectfully requests that the Court grant its Motion and modify the scope of IBM's Subpoena and/or enter a protective order that is consistent with *HP's April 17 and 24, 2008 Meet and Confer Compromise Offers* (as set forth on pp. 4-5) and HP's [Proposed] Order (filed concurrently herewith).

DATED: April 29, 2008

JEFFREY T. THOMAS
ANGELIQUE KAOUNIS
GIBSON, DUNN & CRUTCHER LLP

By: Angelique Kaounis / BMG
Angelique Kaounis

Attorneys for Nonparty
HEWLETT-PACKARD COMPANY

¹⁰ In recognition of this burden, IBM has stated that it does not expect HP's witnesses to have client-by-client knowledge regarding this topic, but at the same time it has not agreed to withdraw this specific request. Kaounis Decl., ¶ 23 & Exh. O.

EXHIBIT 3

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re IBM 30(b)(6) Deposition Subpoena in
the matter of:

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Plaintiff and Counterclaim
Defendant,

v.

PLATFORM SOLUTIONS, INC.,

Defendant and
Counterclaimant.

CASE NO. C07-80174 RMW (PVT)

Underlying action pending in the United
States District Court for the Southern District
of New York, CASE NO. CV 06-13565 SCR

**DECLARATION OF STEPHEN
HOWARD IN SUPPORT OF HP'S
MOTION TO MODIFY SUBPOENA
AND FOR A PROTECTIVE ORDER
[LODGED UNDER SEAL PURSUANT
TO L.R. 79-5]**

[Notice of Motion, Motion, Memo. of Points
and Authorities; Declarations of Angelique
Kaounis and John Pickett; Request for
Judicial Notice in Support hereof; and
[Proposed] Order filed concurrently
herewith]

Hearing Date: June 3, 2008
Hearing Time: 10:00 a.m.
Place: Courtroom 5
Before: Hon. Patricia V. Trumbull

1 I, STEPHEN HOWARD, hereby declare as follows:

2 1. I am a Business Development Manager currently employed by Hewlett-
3 Packard Company ("HP") in its High Performance Computing Division ("HPCD"). I
4 make this declaration in support of HP's Motion to Modify Subpoena and for a
5 Protective Order ("HP's Current Motion"), and specifically to provide the Court with
6 an explanation as to the nature HP's business relationship (since the fall of 2006)
7 with the Defendant and Counterclaim Plaintiff in the underlying action, Platform
8 Solutions Inc. ("PSI"). All matters stated herein are of my own personal knowledge,
9 and if called as a witness, I could and would competently testify thereto.

10 2. I have worked at HP since the company acquired Compaq (my previous
11 employer) in approximately 2002. During my tenure at HP, I have worked in various
12 capacities in connection with HP's Business Critical Systems ("BCS") global
13 business unit. BCS is part of HP's Enterprise System Solutions group ("ESS"),
14 which is a subgroup of the Technology Systems Group ("TSG"). TSG is one of HP's
15 three major businesses, which provides business products including storage and
16 servers, as well as managed services and software.

17 3. In my current position, I develop business programs for HP's channel
18 partners—*i.e.*, entities that sell or resell HP computing systems. I have been in that
19 position since approximately July, 2007. Prior to occupying my current position, I
20 was employed as a Partner Program Manager for HP's Enterprise Solutions Alliances
21 (ESA), which was also part of TSG. The primary alliance that I managed from the
22 time I joined HP through June 2007 was with Intel. The alliance related to joint
23 marketing activity between HP and Intel around the Itanium architecture and HP's
24 Integrity server products.

25 4. During my tenure in the Enterprise Solutions Alliances group, I came to
26 learn that PSI had been developing microcode to enable users of Itanium-based
27 servers (such as HP's Integrity servers) to run an IBM Operating System ("OS") and
28

IBM applications on those servers. Through my work in ESA, I also came to learn in approximately 2006, that PSI was a standard authorized reseller of select HP products (including HP Integrity servers), and, that in approximately October 2006, **REDACTED REDACTED REDACTED REDACTED** An authorized reseller of HP products is only one of the several different types of channel partners that HP utilizes to sell products to various customer groups. HP also works with: (1) retailers; (2) distribution partners that supply HP solutions to smaller resellers with which we do not have direct relationships; (3) independent distributors that sell HP products into geographies or customer segments in which HP has little or no presence; (4) original equipment manufacturers (“OEMs”) that integrate HP products with their own hardware or software and sell the integrated products; (5) independent software vendors (“ISVs”) that provide their clients with specialized software products; and (6) systems integrators that provide various levels and kinds of expertise in designing and implementing custom IT solutions. During the time period 2006 to the present, HP has been a party to channel partner agreements with thousand of companies.

5. During part of the time that I worked as a Partner Program Manager (from the fall of 2006 through mid-2007), I was a regular HP point of contact for the PSI relationship, and thus, I interacted on an as-needed basis with representatives from PSI. PSI came under my purview in the fall of 2006, at which time I was specifically introduced to PSI as the HP Partner Manager who was tasked with assuring that all of HP’s standard reseller support mechanisms and channels of contact were properly set up and maintained for PSI. Based on my experience during that time,

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REDACTED it treated PSI just as it would any other authorized reseller of HP servers.

6. During part of the time that I worked as a Partner Program Manager, PSI's status as an authorized reseller of HP's server products meant that PSI had a contractual agreement with HP to sell certain HP products and services in a particular geographic area for a specified period of time. Pursuant to its reseller agreement with PSI, HP provides a warranty for its own HP-branded hardware and services, but does not provide one for non-HP branded products and services separately developed and/or provided by PSI, nor does HP otherwise make representations as to the validity, performance, etc. of such products or services. In fact, pursuant to its standard reseller agreements, HP specifically does not warrant any third party products, services or support even if they are included with an HP branded product. Additionally, HP's reseller agreement with PSI expressly provides that it does not establish a franchise, partnership, joint venture, or agency relationship between HP and PSI in connection with the agreement.

7. PSI is also currently a member of HP's Developer & Solution Partner Program (DSPP). DSPP is HP's worldwide program for independent software vendors, software developers, system integrators, and consultants, by which it provides support—*e.g.*, training, courses, technical support (such as access to an email box for partners to ask an HP agent support questions), webinars, mailings, etc.—for entities seeking to develop and demonstrate their software on HP hardware. DSPP membership requirements (for companies) include: (a) the provision of a company profile information, current email and phone number of one primary contact and acceptance of the program terms in the DSPP contracts; (b) having at least one product or service commercially available on, or a plan on porting to an HP platform; (c) maintenance of all current company and contact information and entries within the partner product catalog; and (d) having a product, or service, that supports HP. HP's agreements with DSPP partners do not obligate either party to use or market products developed by the other party and also expressly provide that

1 no relationship of agency, partnership, joint venture, legal representation or other
2 form of association with HP or HP's products is intended by or may be claimed by
3 the partners in connection with the agreements.

4 8. HP has DSPP agreements with companies in close to 100 countries in
5 numerous industries and has thousands of partners that provide server-related
6 technologies. Thus, PSI's status as a DSPP member does not elevate it to any
7 heightened level of strategic significance in connection with HP's products or in
8 comparison to any other partner offerings that could be used as an alternative to a
9 mainframe solution.

10 I declare under penalty of perjury under the laws of the State of California and
11 the United States of America that the foregoing is true and correct. Executed this
12 28 th day of April 2008 at Sudbury Massachusetts.

13
14 By: Stephen Howard
15 Stephen Howard
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EXHIBIT 4

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re IBM 30(b)(6) Deposition Subpoena in the
matter of:

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Plaintiff and Counterclaim
Defendant,

v.

PLATFORM SOLUTIONS, INC.,

Defendant and Counterclaimant.

CASE NO. C07-80174 RMW (PVT)

Underlying action pending in the United States
District Court for the Southern District of New
York, CASE NO. CV 06-13565 SCR

**DECLARATION OF ANGELIQUE
KAOUNIS IN SUPPORT OF NONPARTY
HEWLETT-PACKARD COMPANY'S
MOTION TO MODIFY SUBPOENA AND
FOR A PROTECTIVE ORDER
[WITH REDACTED EXHIBITS FOR
FILING PURSUANT TO L.R. 79-5]**

[Notice of Motion, Motion, Memo. of Points and
Authorities; Declarations of Stephen Howard and
John Pickett; Request for Judicial Notice in
Support hereof; and [Proposed] Order filed
concurrently herewith]

Date: June 3, 2008
Time: 10:00 a. m.
Place: Courtroom 5
Before: The Honorable Patricia V.
Trumbull

I, ANGELIQUE KAOUNIS, hereby declare as follows:

1. I am an attorney licensed to practice in the State of California and before this Court, and I am an associate at the law firm of Gibson, Dunn, & Crutcher LLP (“Gibson Dunn”), attorneys of record for Nonparty Hewlett-Packard Company (“HP”). I make this declaration in support of *HP’s Motion to Modify Subpoena and for a Protective Order* (“HP’s Motion”), filed concurrently herewith. All matters stated herein are of my own personal knowledge and, if called as a witness, I could and would competently testify thereto.

2. This matter arises out of International Business Machines’ (“IBM”) March 10, 2008 issuance of a 30(b)(6) deposition subpoena (the “Subpoena”) to nonparty HP in the underlying action entitled *International Business Machines v. Platform Solutions Inc.* (S.D.N.Y. CASE NO. CV 06-13565 SCR) (“*IBM v. PSI*”). Attached hereto as Exhibit A is a true and correct copy of IBM’s March 10, 2008 Subpoena.

3. Attached hereto as Exhibit B is a true and correct copy of the *Redacted Amended Civil Complaint* (without exhibits) filed by IBM against Platform Solutions, Inc. (“PSI”) on August 17, 2007, in the matter entitled *IBM v. PSI*.

4. Attached hereto as Exhibit C is a true and correct copy of *Platform Solutions, Inc.’s Redacted Amended Counterclaims to International Business Machines Corporation’s Complaint* filed by PSI against IBM on February 8, 2008, in the matter entitled *IBM v. PSI*.

5. I have worked as outside counsel for HP on several matters during my employment at Gibson Dunn and am familiar with the locations of many of the HP offices throughout the United States. HP is headquartered at 3000 Hanover St., Palo Alto, California.

6. During Gibson, Dunn’s representation of HP, I have had the opportunity to work with numerous people in different areas of HP’s business, including the Imaging and Printing Group and the Technology Solutions Group (the group that oversees the portion of HP’s business that includes products such as storage and servers, managed services and software). I have dealt with hardware and software engineers, and individuals who work in departments such marketing, human factors engineering, strategy and corporate development, finance, legal and IT. I have also

1 reviewed thousands of HP documents in my work for the company. I am thus familiar with how
2 HP maintains the confidentiality of certain types of materials, and which materials, as a general
3 policy, warrant confidential treatment. HP protects its intellectual property and confidential
4 proprietary materials in part because it invests a significant amount of capital in research and
5 development each year. Because HP is a technology company, and because it invests a significant
6 amount of capital in research and development each year, it is the company's policy when involved
7 in litigation to use a strict Protective Order that has a confidentiality designation of "outside
8 counsels' eyes only" for highly confidential proprietary or trade secret information. In this case, I
9 personally negotiated Protective Orders with IBM, PSI and T3T (the parties to the underlying
10 litigation), and all three Protective Orders provide for this type of "two-tiered" confidentiality
11 designations. In the case of the Protective Orders with PSI and T3T, there is no provision which
12 allows any PSI or T3T employee to see documents marked "OUTSIDE COUNSEL'S EYES
13 ONLY." In the case of the Protective Order negotiated with IBM, IBM may disclose HP's
14 Confidential Information designated "OUTSIDE COUNSEL'S EYES ONLY" to two (2) identified
15 in-house legal counsel, provided that those in-house counsel have no involvement in competitive
16 decision-making or patent prosecution, and agree to abide by the Protective Order.

17 7. HP has ongoing business relationships with the parties to the *IBM v. PSI* lawsuit, but
18 is not a party to the underlying litigation. Among other things, PSI is an authorized reseller of HP
19 Integrity servers, and HP and IBM are parties to a patent cross-licensing agreement. IBM and HP
20 are also competitors in the markets for desktop and laptop computers, server hardware, and related
21 services and products.

22 8. Over the last year, HP has been served with seven separate subpoenas for documents
23 and testimony in this case, and has produced approximately 25,000 pages of documents, as well as
24 an extensive privilege log in connection with this production.

25 9. On February 14, 2008, I received a letter from Katherine Weall, counsel for IBM,
26 stating that IBM intended to seek the 30(b)(6) deposition of witness(es) from HP on 13 proposed
27 deposition topics. Attached hereto as Exhibit D is a true and correct copy of Ms. Weall's February
28 14, 2008 letter.

1 10. Immediately upon receipt of the February 14, 2008 letter, I began investigating if
2 and how HP could respond to the proposed 30(b)(6) topics and who, if anyone, would be an
3 appropriate person to provide testimony on the various proposed topics outlined in the letter.

4 11. On February 19, 2008, I sent Ms. Weall an email to confirm that I would accept
5 service on behalf of HP, but also to alert her that HP considered a number of the topics outlined in
6 IBM's proposal to be overbroad and otherwise objectionable. I requested that IBM narrow its
7 proposed topics (keeping in mind that HP is a nonparty). Attached hereto as Exhibit E is a true and
8 correct copy of the email I sent to Ms. Weall on February 19, 2008. Exhibits E, F, G, N, O, P, Q,
9 and R (discussed herein) are portions of longer email chains. For the Court's ease of reference,
10 these emails have been broken out into separate exhibits.

11 12. Two days later, on February 21, 2008, Ms. Weall responded to my February 19,
12 2008 request and again asked nonparty HP to narrow the scope of IBM's proposed subpoena topics.
13 Attached hereto as Exhibit F is a true and correct copy of the email I received from Ms. Weall on
14 February 21, 2008.

15 13. On February 26, 2008, I sent Ms. Weall an email indicating that HP would not
16 undertake the burden of narrowing IBM's proposed topics for IBM's own subpoena. Attached
17 hereto as Exhibit G is a true and correct copy of the email I sent to Ms. Weall on February 26,
18 2008.

19 14. Ms. Weall responded to my February 26, 2008 email with a letter on February 29,
20 2008, which reiterated IBM's request that HP rewrite IBM's proposed subpoena topics. Attached
21 hereto as Exhibit H is a true and correct copy of the letter I received from Ms. Weall on February
22 29, 2008.

23 15. On March 5, 2008, Eric Raines, a Gibson Dunn associate and outside counsel for HP
24 (who is working on this case with me), sent Ms. Weall a letter again requesting that IBM tailor its
25 proposed list of subpoena topics, rather than imposing this burden on HP. The letter also reiterated
26 that HP was willing to meet and confer about the scope of the proposed 30(b)(6) subpoena topics
27 once IBM had made such revisions. Attached hereto as Exhibit I is a true and correct copy of the
28 letter from Mr. Raines to Ms. Weall dated March 5, 2008.

1 16. On March 7, 2008, Ms. Weall sent a letter to Mr. Raines rejecting his proposal and
2 once again implying that it was HP's burden to revise IBM's proposed 30(b)(6) subpoena topics.
3 Attached hereto as Exhibit J is a true and correct copy of the letter Mr. Raines and I received from
4 Ms. Weall on March 7, 2008.

5 17. On March 10, 2008, IBM served HP with its Subpoena. The Subpoena contains the
6 exact same set of proposed topics set forth in Ms. Weall's February 14, 2008 letter. In addition, the
7 Subpoena does not contain any temporal or geographic limitations, despite the fact that HP had
8 previously notified IBM of this deficiency in connection with IBM's proposed 30(b)(6) topics.

9 18. In response to IBM's Subpoena, HP continued to investigate the information it
10 would be able to provide in response to the Subpoena and who might be the appropriate person(s)
11 to testify as to each topic. Mr. Raines contacted Ms. Weall on March 17, 2008 via letter to propose
12 that the parties work together to negotiate the scope of HP's response to the Subpoena. Attached
13 hereto as Exhibit K is a true and correct copy of the letter Mr. Raines sent to Ms. Weall on March
14 17, 2008, on which I was copied.

15 19. IBM responded via email on March 18, 2008 agreeing to meet and confer, and the
16 parties thereafter scheduled a conference call to discuss the scope of the deposition topics in IBM's
17 Subpoena. The parties (including myself and Mr. Raines on HP's behalf) held that meet and confer
18 discussion via telephone on March 21, 2008, during which the parties' counsel discussed each
19 proposed category of testimony. For the majority of topics in IBM's Subpoena, HP proposed either
20 to provide a written response, documentation or a witness.

21 20. In accordance with IBM's request during the March 21, 2008 meet and confer
22 telephone call, and in a good faith effort to reach an agreement concerning the Subpoena, HP sent
23 IBM a letter on March 28, 2008 formalizing its proposals, and also including information on
24 certain topics about which it had discovered further information that was not available prior to the
25 March 21, 2008 telephone call. Attached hereto as Exhibit L is a true and correct copy of the letter
26 I sent to Ms. Weall on March 28, 2008.

27 21. On April 9, 2008, Ms. Weall sent a further meet and confer letter in which she
28 stated, with regard to Topic Nos. 3, 6, and 8, that IBM sought "testimony regarding actual or

1 potential competition faced by HP's servers, particularly insofar as they compete with IBM's
2 zSeries and S/390 servers." In this same letter, IBM withdrew its request for testimony on the
3 portion of Topic No. 8 relating to OEMs. Attached hereto as Exhibit M is a true and correct copy
4 of the letter I received from Ms. Weall on April 9, 2008.

5 22. The parties (including myself and Mr. Raines on HP's behalf) held another
6 telephonic meet and confer discussion on April 9, 2008, during which the parties' counsel further
7 clarified the scope of each requested topic. On April 10, 2008, I sent an email to Ms. Weall
8 summarizing that conversation and setting forth HP's position as to each topic. Attached hereto as
9 Exhibit N is a true and correct copy of that April 10, 2008 email.

10 23. The parties (including myself and Mr. Raines on HP's behalf) held an additional
11 telephonic meet and confer discussion on April 15, 2008, during which each of the proposed topics
12 was further discussed. As a result of that discussion, the parties came to an agreement that an HP
13 witness would not be required to testify as to the granular or specific client-related details of Topic
14 Nos. 1-8, and would not be expected to discuss specific communications, documents, components
15 of HP's mainframe alternative solutions, or client or ISV relationships. Rather, HP's witness might
16 be asked to comment on whether a particular communication, document, component, or
17 relationship would be consistent or inconsistent with HP's understanding and strategy at a broader
18 level. *See Exhibit O infra.*

19 24. On April 17, 2008, I sent Jonathan Oblak, counsel for IBM, an email summarizing
20 our April 15, 2008 discussion and setting forth HP's position with respect to each topic. Attached
21 hereto as Exhibit O is a true and correct copy of that April 17, 2008 email, which Mr. Oblak
22 responded to on April 22, 2008 (as set forth in Exhibit O).

23 25. The parties held another meet and confer discussion on Monday, April 21, 2008,
24 during which it became apparent that the parties disagreed as to the appropriate timeframe with
25 respect to the deposition topics, as well as to the scope of deposition Topic No. 7. HP took the
26 position that the relevant time period is 2004-2006, whereas IBM stated that the relevant time
27 period should extend from 2003 through 2008.

1 26. On April 23, 2008, Mr. Oblak emailed me and indicated that IBM was unable to
2 agree to HP's time period limitations. Attached hereto as Exhibit P is a true and correct copy of
3 that April 23, 2008 email.

4 27. On April 24, 2008, I emailed Mr. Oblak with HP's final offer. HP offered to
5 proceed with the depositions limited to the 2003-2006 time period, with an exception for testimony
6 on publicly available information that post-dated 2006 for several of the topics. Specifically, I
7 offered on HP's behalf, to provide a witness who could testify regarding current publicly available
8 information reflecting HP's provision of mainframe alternative solutions and HP's attempts to
9 migrate customers off of IBM mainframes and onto HP hardware. HP has also offered to provide a
10 witness who can authenticate the web pages containing this publicly available information.
11 Attached hereto as Exhibit Q is a true and correct copy of that April 24, 2008 email.

12 28. On April 25, 2008, Mr. Oblak emailed me and indicated that HP's offer was not
13 acceptable, but did not specifically articulate why HP's confidential information is relevant and
14 necessary to defend against PSI's claims, and why the publicly available information is insufficient
15 to serve this purpose. He also stated that IBM is unwilling to limit the scope of its 2007-2008
16 inquiries to public information. Attached hereto as Exhibit R is a true and correct copy of that
17 April 25, 2008 email. The non-public 2007-2008 information regarding HP's provision of
18 mainframe alternative solutions and HP's attempts to migrate customers off of IBM mainframes
19 and onto HP hardware reflects highly sensitive competitive information such as current strategic
20 planning information and analyses of market dynamics, that HP, as a rule, would not willingly
21 disclose to a competitor or potential competitor.

22 29. IBM's own documents show that it focuses its competitive efforts against HP's
23 Integrity server, the same family of hardware that PSI sold in connection with its mainframe
24 alternative solution. Attached hereto as Exhibit S is a true and correct copy of a PowerPoint
25 presentation entitled *z9 Enterprise Class and HP Integrity Superdome - Features Overview and*
26 *Comparison, IBM, July 2007*, which I downloaded from IBM's website at [http://www-](http://www-07.ibm.com/systems/includes/content/z/about/HPSuperdome_vs_z9EC_07272007.pdf)
27 [07.ibm.com/systems/includes/content/z/about/HPSuperdome_vs_z9EC_07272007.pdf](http://www-07.ibm.com/systems/includes/content/z/about/HPSuperdome_vs_z9EC_07272007.pdf) on April 9,
28 2008.

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**INTERNATIONAL BUSINESS
MACHINES CORPORATION,**

Plaintiff,

-vs.-

**PLATFORM SOLUTIONS, INC., and
T3 TECHNOLOGIES, INC.,**

Defendants.

Civil Action No. 06 CV 13565 (CLB)

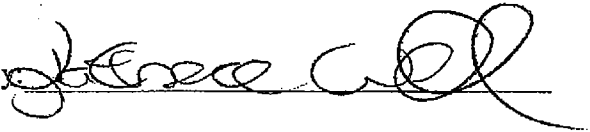
IBM'S RULE 30(b)(6) DEPOSITION NOTICE TO HP

PLEASE TAKE NOTICE THAT, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Plaintiff International Business Machines Corporation ("IBM") will depose Hewlett-Packard Development Company, LP ("HP") on April 12, 2008 or such other date agreed to by the parties. The deposition shall take place at the offices of Quinn Emanuel Urquhart Oliver & Hedges, LLP, 555 Twin Dolphin Drive, Suite 560, Redwood Shores, CA 94065, or according to alternative arrangements upon which the parties jointly agree. The deposition shall be recorded by videotape, audiotape, and stenographic recording.

HP shall designate one or more of its officers, directors, managing agents, or other persons who consent to testify on HP's behalf as to all matters known or reasonably available to HP with respect to the Topics of Examination set forth in the attached Exhibit.

DATED: New York, New York
March 10, 2008

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

By 

Richard I. Werder, Jr. (RW-5601)
Philippe Z. Selendy (PS-6972)
Jonathan B. Oblak (JO-5340)
Katherine J. Weall (KW-7389)
51 Madison Avenue
22nd Floor
New York, New York 10010-1601
(212) 849-7000

Frederick A. Lorig
865 S. Figueroa Street
Los Angeles, California 90017
(213) 443-3000

Attorneys for Plaintiff
International Business Machines Corporation

AO88 (Rev. 12/07) Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT
 Northern District of California

International Business Machines Corporation
 V.

SUBPOENA IN A CIVIL CASE

Platform Solutions, Inc., T3 Technologies, Inc.

Case Number:¹ 06-CV-13565 (CLB) (SDNY)

TO: Hewlett Packard Development Company, LP, C/O Angelique
 Kaounis, Gibson, Dunn & Crutcher, LLP, 333 South Grand
 Avenue, Los Angeles, CA 90071 (213) 229-7000

☐ YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

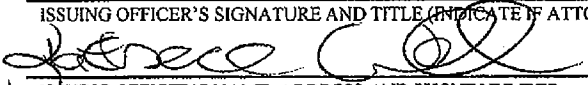
PLACE OF DEPOSITION	DATE AND TIME
Quinn Emanuel Urquhart Oliver & Hedges, LLP, 555 Twin Dolphin Drive, Suite 560, Redwood Shores, CA 94065	4/15/2008 9:30 am

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME
<input type="checkbox"/> YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.	

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rule of Civil Procedure 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
	3/10/2008

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Katherine Weall, Quinn Emanuel Urquhart Oliver & Hedges, LLP, 51 Madison Avenue, 22nd Floor, New York, NY 10010, (212) 849-7000 Attorneys for Plaintiff International Business Machines Corporation

(See Federal Rule of Civil Procedure 45 (c), (d), and (e), on next page)

¹ If action is pending in district other than district of issuance, state district under case number.

AO88 (Rev. 12/07) Subpoena in a Civil Case (Page 2)

PROOF OF SERVICE

DATE	PLACE
SERVED	
SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on

DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Federal Rule of Civil Procedure 45 (c), (d), and (e), as amended on December 1, 2007:

(c) PROTECTING A PERSON SUBJECT TO A SUBPOENA.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) DUTIES IN RESPONDING TO A SUBPOENA.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) CONTEMPT.

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

EXHIBIT

DEFINITIONS AND INSTRUCTIONS

- A. "HP" shall refer to Hewlett-Packard Company, and its officers, directors, employees, agents, associates, parents, subsidiaries, affiliates, predecessors, successors, and persons or entities acting for or on its behalf or at its direction.
- B. "HP Personnel" shall mean any present or past agent, attorney, employee, employer, officer, director, consultant, subcontractor, or any other person acting on behalf of or purporting to act on behalf of HP at any time. This term is not limited to persons working directly for HP, but shall encompass persons working for, without limitation, HP's business partners, subsidiaries, predecessors, technology providers and other similar entities.
- C. "PSI" shall refer to Platform Solutions, Inc. and its officers, directors, employees, agents, associates, parents, subsidiaries, affiliates, predecessors, successors, and persons or entities acting for or on its behalf or at its direction.
- D. "PSI Personnel" shall mean any present or past agent, attorney, employee, employer, officer, director, consultant, subcontractor, or any other person acting on behalf of or purporting to act on behalf of PSI at any time. This term is not limited to persons working directly for PSI, but shall encompass persons working for, without limitation, PSI's business partners, subsidiaries, predecessors, technology providers and other similar entities.
- E. HP's "Mainframe Alternative Consolidation solutions" shall have the meaning imputed to it on HP's website.¹

¹ See, e.g., http://h71028.www7.hp.com/enterprise/cache/151824-0-0-225-121.html?jumpid=reg_R1002_USEN, and related areas of HP's website, last visited January 3, 2008.

F. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

G. "Concerning" means relating to or referring to.

H. "Referring to," "relating to," or "regarding" means concerning, containing, describing, discussing, embodying, commenting upon, identifying, incorporating, summarizing, constituting, comprising or otherwise pertinent to the matter or any aspect thereof.

I. The terms "all" and "each" shall be construed as "all and each."

J. The terms "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

K. The use of the singular form of any word includes the plural and vice versa.

TOPICS OF EXAMINATION

1. HP's relationship with PSI, including but not limited to HP's communications and/or dealings with PSI, HP's objectives in communicating and/or dealing with PSI, HP's technical assistance to PSI, and any partnership, whether formal or informal, between HP and PSI.
2. HP's **REDACTED** **REDACTED** including, without limitation, the r **REDACTED**
3. HP microprocessors sold for use in servers that compete with IBM's zSeries servers and S/390 servers, including, without limitation, the processing power, cost and capabilities of such microprocessors and the customers that use such microprocessors.
4. HP's Mainframe Alternative Consolidation solutions.
5. HP's marketing of and participation in mainframe migration strategies.
6. Actual or potential competition for customers and workloads between IBM z/Series and/or S/390 computer servers and computer servers incorporating HP microprocessors.
7. Whether and to what extent HP believes that end-users of IBM mainframes are "locked-in" to continued use of IBM mainframes, including, without limitation, the reason(s) any such lock-in exists; the specific end users whom HP believes are "locked-in;" and HP's response to claims that end users of IBM mainframes are "locked-in."
8. The success of HP and OEMs in marketing servers incorporating HP microprocessors to enable partial or total migration of workloads off of IBM mainframes.
9. HP's present and past use of IBM and/or IBM-compatible mainframes; the extent to which HP has moved its workloads off of IBM and/or IBM-compatible mainframes to other platforms, and whether and to what extent HP concluded that it was incapable of migrating any workloads that it was running on IBM mainframes or IBM-compatible mainframes to other platforms.
10. The Itanium Solutions Alliance ("ISA"), including, without limitation, the objectives of the ISA and HP's role in founding, promoting, and/or participating in the ISA.
11. The Mainframe Migration Alliance ("MMA"), including, without limitation, the activities or objectives of the MMA and HP's role in founding, promoting and or participating in the MMA.

12. Any documents relating to this action.
13. The five persons at HP most knowledgeable concerning each of the foregoing topics.

EXHIBIT D

quinn emanuel trial lawyers | new york

51 Madison Avenue, 22nd Floor, New York, New York 10010 | TEL 212-849-7000 FAX 212-849-7100

WRITER'S DIRECT DIAL NO.
(212) 849-7197

WRITER'S INTERNET ADDRESS
katherineweall@quinnemanuel.com

February 14, 2008

VIA EMAIL AND UNITED STATES POSTAL SERVICE

Angelique Kaounis
Gibson Dunn & Crutcher
333 South Grand Avenue
Los Angeles, CA 90071-3197

Re: International Business Machines Corporation v. Platform Solutions, Inc.
Civil Action No. 06 CV 13565

Dear Angelique:

I write to advise that International Business Machines Corporation ("IBM") intends to seek the 30(b)(6) deposition of a witness or witnesses from Hewlett-Packard Corporation ("HP"), and to request your assistance in scheduling a mutually convenient time and place for that deposition.

We envision the deposition covering the following topics, with the relevant timeframe being 1999 to the present:

1. HP's relationship with PSI, including but not limited to HP's communications and/or dealings with PSI, HP's objectives communicating and/or dealing with PSI, HP's technical assistance to PSI, and any partnership, whether formal or informal, between HP and PSI.
2. REDACTED REDACTED
3. HP microprocessors sold for use in servers that compete with IBM's zSeries servers and S/390 servers, including, without limitation, the processing power, cost and capabilities of such microprocessors and the customers that use such microprocessors.
4. HP's Mainframe Alternative Consolidation solutions.

quinn emanuel waruhart oliver & hedges, llp

LOS ANGELES | 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017 | TEL 213-443-3000 FAX 213-443-3100

SAN FRANCISCO | 50 California Street, 22nd Floor, San Francisco, California 94111 | TEL 415-875-6600 FAX 415-875-6700

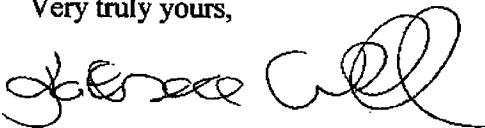
SILICON VALLEY | 555 Twin Dolphin Drive, Suite 560, Redwood Shores, California 94065 | TEL 650-801-5000 FAX 650-801-5100

TOKYO | Akasaka Twin Tower Main Building, 6th Floor, 17-22 Akasaka 2-Chome, Minato-ku, Tokyo 107-0052, Japan | TEL +81-3-5561-1711 FAX +81-3-5561-1712

5. HP's marketing of and participation in mainframe migration strategies.
6. Actual or potential competition for customers and workloads between IBM z/Series and/or S/390 computer servers and computer servers incorporating HP microprocessors.
7. Whether and to what extent HP believes that end users of IBM mainframes are "locked-in" to continued use of IBM mainframes, including, without limitation, the reason(s) any such lock-in exists; the specific end users whom HP believes are "locked in;" and HP's response to claims that end users of IBM mainframes are "locked in."
8. The success of HP and OEMs in marketing servers incorporating HP microprocessors to enable partial or total migration of workloads off of IBM mainframes.
9. HP's present and past use of IBM and/or IBM-compatible mainframes; the extent to which HP has moved its workloads off of IBM and/or IBM-compatible mainframes to other platforms and whether and to what extent HP concluded that it was incapable of migrating any workloads that it was running on IBM mainframes or IBM-compatible mainframes to other platforms.
10. The Itanium Solutions Alliance ("ISA"), including, without limitation, the objectives of the ISA and HP's role in founding, promoting, and/or participating in the ISA.
11. The Mainframe Migration Alliance, including without limitation the activities and objectives of the MMA and HP's role in founding, promoting, and/or participating in the MMA.
12. Any documents relating to this action.
13. The identity of the five persons at HP most knowledgeable concerning each of the foregoing topics.

Please call me at your earliest convenience so that we can discuss a suitable witness, time, and place for the deposition. In addition, please confirm that you will accept service of a 30(b)(6) subpoena to HP on its behalf.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Katherine J. Weall', with a large, stylized flourish at the end.

Katherine J. Weall

EXHIBIT H

quinn emanuel trial lawyers | new york

51 Madison Avenue, 22nd Floor, New York, New York 10010 | TEL 212-849-7000 FAX 212-849-7100

WRITER'S DIRECT DIAL NO.
(212) 849-7197

WRITER'S INTERNET ADDRESS
katherineweall@quinnemanuel.com

February 29, 2008

VIA ELECTRONIC AND FIRST CLASS MAIL

Angelique Kaounis, Esq.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

Re: IBM in IBM v. Platform Solutions, Inc., Case No. 06-13565 (CLB)

Dear Ms. Kaounis:

I write in reference to Eric Raines' email of February 27, 2008, which was copied to you, regarding International Business Machines Corporation's ("IBM's") request for a 30(b)(6) deposition from a witness from Hewlett Packard Corporation ("HP").

Although we appreciate that HP is a third party in this case, it is hardly a "typical" third party in a litigation such as this one. As you know, HP has been very heavily involved, for a number of years, with key aspects of the development of the Platform Solutions, Incorporated ("PSI") product at issue in this case,

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REDACTED REDACTED

In light of HP's substantial involvement with PSI and in issues that go to the heart of the above-captioned case, we respectfully disagree with HP's assertion that IBM is "almost certainly in a better position to trim the 30(b)(6) topics in a manner that calls for the testimony that [IBM] most need[s] from HP." 02/27/08 Raines Email. IBM believes that all of the proposed 30(b)(6) topics are relevant, likely to lead to the discovery of admissible evidence in this case, and does

quinn emanuel urquhart oliver & hedges, llp

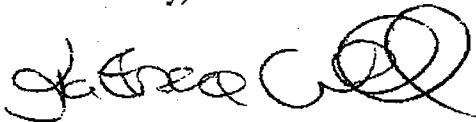
LOS ANGELES | 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017 | TEL 213-443-3000 FAX 213-443-3100
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TOKYO | Akasaka Twin Tower Main Building, 6th Floor, 17-22 Akasaka 2-Chome, Minato-ku, Tokyo 107-0052, Japan | TEL +81-3-5561-1711 FAX +81-3-5561-1712

not believe that the list is overly-burdensome to a third-party that has played such a significant role heretofore.

As it is HP that has objected to the purported "over-breadth" of the deposition topics, IBM has given HP the opportunity to voice specific objections to those topics, and to propose a mutually acceptable list of alternative topics, without having to resort to motion practice. While IBM is certainly willing to consider narrowing the scope of its subpoena, HP is clearly in the best position to assess what information it possesses and the burden associated with producing a knowledgeable witness or witnesses. Accordingly, we again respectfully request that HP proposes what it believes is a list of topics that is not "over-broad."

In the meantime, IBM will issue shortly a formal 30(b)(6) subpoena to HP.

Yours truly,

A handwritten signature in black ink, appearing to read "Katherine J. Weall", with a large, stylized circular flourish at the end.

Katherine J. Weall

EXHIBIT L

GIBSON, DUNN & CRUTCHER LLP

LAWYERS

A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

333 South Grand Avenue Los Angeles, California 90071-3197

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March 28, 2008

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(213) 229-6137

Client No.
T 38126-00565

VIA EMAIL AND U.S. MAIL

Katherine J. Weall, Esq.
Quinn Emanuel Urquhart
Oliver & Hedges, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010

Re: *IBM v. PSI*

Dear Ms. Weall:

I write to follow up on our meet and confer call of last Friday, and to give you greater detail on some of the proposals I offered on HP's behalf during that call. Also, with respect to a few of the categories in IBM's 30(b)(6) subpoena, we have further investigated the extent to which HP is able to provide information in response to IBM's subpoena, and thus I provide that information below as well.

We make these proposals while reserving all rights with respect to the scope of IBM's subpoena. As written, every one of the topics proposed in the subpoena lacks the reasonable particularity required by Federal Rules of Civil Procedure 30(b)(6). Additionally, nearly half of the topics in IBM's subpoena contain the phrases "including but not limited to" or "including, without limitation." This language has been rejected as overbroad and improper in the context of a 30(b)(6) subpoena. *See, e.g., Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002); *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000). Moreover, several of the topics call for testimony regarding the ultimate facts of your case with PSI or seek to elicit what can be classified as opinion or expert testimony. We object to these topics on those grounds and based on the burden they would impose as written. *See Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC*, 227 F.R.D. 421, 426-427 (D.N.C. 2005) (suggesting that a court should "give extra consideration to the objections of a non-party, non-fact witness in weighing

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Katherine Weall, Esq.
March 28, 2008
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burdensomeness versus relevance."). In the interest of addressing these issues informally, we hope that you will continue to work with us to tailor the subpoena appropriately.

In an effort to reach an informal agreement, in accordance with the request that you made during our March 21 meet and confer, we have attempted to narrow the subpoena's topics so that the subpoena calls for only that which we believe is relevant to your case. We look forward to your response to our proposal, and of course we will consider counterproposals in line with what we have set forth below.

You also asked us to propose a briefing schedule, in the event that we were unable to resolve our differences informally. To accommodate your discovery cut-off, we propose that any Motion related to IBM's 30(b)(6) subpoena be filed by April 8th, with any Opposition due by April 22nd and any Reply due by April 29th. Please let me know if this works with your schedule—we are happy to push this back a week or two if this would provide the parties an additional opportunity to narrow any disputed issues. Also, we need to speak further to coordinate the time and place for any depositions. I have also copied counsel for PSI and T3T in the hope that we can all meet and confer further regarding the scope of IBM's subpoena and the timing of any depositions.

In the interest of efficiency, I have classified our proposals according to the topics set forth in IBM's subpoena.

TOPICS OF EXAMINATION

- I. *HP's relationship with PSI, including but not limited to HP's communications and/or dealings with PSI, HP's objectives in communicating and/or dealing with PSI, HP's technical assistance to PSI, and any partnership, whether formal or informal, between HP and PSI.*

HP's Proposal: Keeping in mind that HP already has produced the relevant contracts detailing the relationship between HP and PSI for the time period at issue, HP offers the following:

- A 30(b)(6) witness who can speak to the sales and marketing of HP's hardware in connection with PSI's solution during 2004-2006 for Banca della Marche, Lufthansa, Fidelity, LL Bean, and Estee Lauder, to the extent such efforts took place during that time period.

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- A general written description of HP's technical assistance to PSI during 2004-2006 for Banca della Marche, Lufthansa, Fidelity, LL Bean, and Estee Lauder, to the extent such efforts took place during that time period.

The only aspects of HP's relationship with PSI that are possibly relevant to the case are: (1) the sales and marketing of HP's hardware in connection with PSI's solution; and (2) REDACTED REDACTED REDACTED. We are offering to address each of these topics. HP cannot reasonably be expected to prepare a deponent on every single communication or "dealing" with PSI. We think HP's offer suggests a very practical solution to a request which on its face is not reasonably particularized as required by Federal Rule of Civil Procedure 30(b)(6). We hope you will seriously consider this offer.

2.

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- This is already addressed in HP's response to Topic No. 1.

3.

HP microprocessors sold for use in servers that compete with IBM's zSeries servers and S/390 servers, including, without limitation, the processing power, cost and capabilities of such microprocessors and the customers that use such microprocessors.

- This topic (as well as several others) is based on the incorrect assumption that HP manufactures microprocessors for the products at issue. Putting this aside, much of the information concerning microprocessors that HP uses is available publicly—for example, in specification sheets on HP's website.
HP's Proposal: HP can provide a written list of microprocessors currently used in its hardware if IBM will identify the specific HP hardware for which it seeks this information (provided, of course, this is a reasonable number of items). However, HP is not certain that it can quantify the processing power of these microprocessors in a meaningful way. The power of these processors is measured according to several industry-standard benchmarks. It is unclear whether IBM mainframes have been tested according to the same benchmarks. As IBM is likely aware, if two processors have not been measured against the same benchmarks, one may not be capable of meaningfully comparing their performance. For your information, a list of benchmarks against which HP's Integrity hardware has been tested is available at: http://h20341.www2.hp.com/integrity/cache/514502-0-0-0-121.html?jumpid=reg_R1002_USEN. For IBM to obtain the most reliable data on this point, it would be best for it to consult this website and then go directly to the manufacturers of these processors for further information.

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Katherine Weall, Esq.
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- It would be excessively burdensome for HP to produce a list of all customers that use such microprocessors.

4. *HP's Mainframe Alternative Consolidation solutions.*

- HP's Proposal: HP has already offered to address PSI's solution within the larger context of HP's Mainframe Alternative offerings as set forth in HP's response to Topic No. 1.
- HP does not believe that the entirety of its Mainframe Alternative offerings are relevant to the instant litigation. Moreover, it would be excessively burdensome for HP to prepare a 30(b)(6) witness to address every aspect of its Mainframe Alternative Solutions program. Nonetheless, as discussed in Topic No. 3, HP is prepared to provide a written list of microprocessors that could be used as a "Mainframe Alternative." To the extent IBM seeks additional information regarding HP's mainframe alternative consolidation solutions, we encourage you to visit HP's website at http://h71028.www7.hp.com/enterprise/cache/151824-0-0-225-121.html?jumpid=reg_R1002_USEN, where you will find information on a series of topics related to HP's Mainframe Alternative Solutions, including a general discussion of the benefits that HP believes that its Mainframe Alternative Solutions provide, success stories of clients using HP Mainframe Alternative Solutions, a list of Mainframe Alternative Solution components, and a list of HP's ISV partnerships.

5. *HP's marketing of and participation in mainframe migration strategies.*

- HP's Proposal: HP has already offered to address PSI's solution within the larger context of HP's participation in mainframe migration strategies in HP's response to Topic No. 1.
- HP does not believe that the entirety of its participation in mainframe mitigation strategies is relevant to the instant litigation. Moreover, it would be excessively burdensome for HP to prepare a 30(b)(6) witness to address every aspect of its participation in mainframe mitigation strategies. To the extent IBM seeks additional information regarding HP's marketing of and participation in mainframe migration strategies, we encourage you to visit HP's website at: www.hp.com/go/offmainframes, where you will find numerous articles and interviews with HP personnel on a series of topics related to this topic, including a general discussion of the advantages of migrating to HP, case studies of migration, migration resource articles, and much more.

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Katherine Weall, Esq.
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6. *Actual or potential competition for customers and workloads between IBM z/Series and/or S/390 computer servers and computer servers incorporating HP microprocessors.*
 - HP is not in a position to address "potential" competition because, among other things, this topic is overly broad. Additionally, HP believes that its responses to Topic Nos. 1 and 4 address all relevant aspects of actual competition which are arguably necessary to elicit from HP.
 - HP's Proposal: Presumably, IBM and HP are equally capable of identifying the competition outlined in this request. If IBM can identify specific instances of such competition that are relevant to the instant matter that are not already addressed in HP's responses to Topic Nos. 1 and 4, HP will consider giving additional written responses or testimony regarding the same.
7. *Whether and to what extent HP believes that end-users of IBM mainframes are "locked-in" to continued use of IBM mainframes, including, without limitation, the reason(s) any such lock-in exists; the specific end users whom HP believes are "locked-in;" and HP's response to claims that end users of IBM mainframes are "locked-in."*
 - This topic appears to call for an expert or legal conclusion, particularly in light of your explanation that this terminology was lifted right from PSI's counterclaims in this matter. HP does not believe the Rule 30(b)(6) would require it to provide a response to this topic beyond what it has offered to provide in response to Topic Nos. 1 and 4.
8. *The success of HP and OEMs in marketing servers incorporating HP microprocessors to enable partial or total migration of workloads off of IBM mainframes.*
 - HP's Proposal: The term "success" indicates that this topic is more appropriately addressed by an expert. Absent clarification of this term, HP will only respond to this topic as described above in response to Topic Nos. 1 and 4. Moreover, as with Topic No. 3, this topic is based on the incorrect assumption that HP manufactures microprocessors for the products at issue. Finally, this topic seeks information regarding other OEMs that is more appropriately directed to those individual companies and therefore this topic imposes an undue burden on HP.

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9. *HP's present and past use of IBM and/or IBM-compatible mainframes; the extent to which HP has moved its workloads off of IBM and/or IBM-compatible mainframes to other platforms, and whether and to what extent HP concluded that it was incapable of migrating any workloads that it was running on IBM mainframes or IBM-compatible mainframes to other platforms.*
 - HP's Proposal: During our meet and confer, we asked you to clarify what specifically IBM was seeking by way of this request—e.g., is IBM just looking for a list of instances in which HP—as opposed to a customer or partner of HP—was purportedly incapable of migrating any of its workloads from IBM mainframes to other platforms? You indicated that you would take this question back to your client. Please let us know IBM's response.
10. *The Itanium Solutions Alliance ("ISA"), including, without limitation, the objectives of the ISA and HP's role in founding, promoting, and/or participating in the ISA.*
 - HP's Proposal: As I mentioned on our call, because this topic asks HP to produce a 30(b)(6) witness on the objectives of a wholly separate legal entity, we believe this is not an appropriate 30(b)(6) category. Nevertheless, HP will offer to produce a written response that describes HP's role in promoting, and/or participating in the ISA in 2005-2006.
11. *The Mainframe Migration Alliance ("MMA"), including, without limitation, the activities or objectives of the MMA and HP's role in founding, promoting and/or participating in the MMA.*
 - HP is not a member of the Mainframe Migration Alliance, so it is unable to provide you with a 30(b)(6) witness on this topic.
12. *Any documents relating to this action.*
 - HP's Proposal: During our meet and confer, you indicated that this topic was simply meant to cover authentication of documents that HP produced. We replied that HP would be willing to authenticate, to the extent it could, a reasonable number of documents that you identified by Bates range. This offer is still open.

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Katherine Weall, Esq.

March 28, 2008

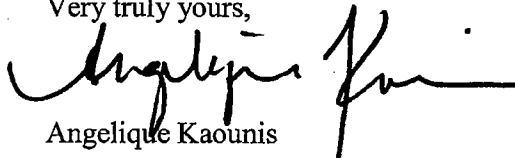
Page 7

13. *The five persons at HP most knowledgeable concerning each of the foregoing topics.*

- HP believes that, according to Federal Rule of Civil Procedure 30(b)(6), it is only obligated to produce the identity of one person per reasonably particularized category, not five. HP has offered to produce a witness and/or written responses to many of the above-listed categories, but believes that requiring it to do anything further is unduly burdensome.

Again, our responses are subject to further meeting and conferring with you. In certain of our responses, we have asked for further clarification, identified more appropriate sources for the information you appear to seek, and suggested information that you can rely on to better tailor IBM's subpoena. We look forward to continuing to work with you to resolve this matter informally.

Very truly yours,



Angelique Kaounis

AK/cdd

cc: Jeffrey T. Thomas
Eric M. Raines
Ryan Kirpatrick
Elizabeth Walker
David Patron

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EXHIBIT M

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(212) 849-7197

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katherineweall@quinnemanuel.com

April 9, 2008

VIA ELECTRONIC AND FIRST CLASS MAIL

Angelique Kaounis, Esq.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

Re: IBM v. Platform Solutions, Inc., Case No. 06-13565 (LK)

Dear Ms. Kaounis:

I write in reference to your letter of March 28, 2008, which contained proposals for narrowing the scope of the topics proposed for International Business Machines Corporation's ("IBM's") 30(b)(6) deposition of a witness from Hewlett Packard Corporation ("HP").

Although we are still consulting with our client, we hope and expect that IBM and HP will be able to agree on a mutually acceptable scope for the 30(b)(6) topics.

In the interests of efficiency, I will respond to the categories outlined in your letter in the same order that you proposed them. The following proposals are made for the purpose of initiating a detailed further discussion, and with a full reservation of IBM's right to seek more extensive testimony if necessary.

quinn emanuel arquhart oliver & hedges, llp

LOS ANGELES | 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017 | TEL 213-443-3000 FAX 213-443-3100
SAN FRANCISCO | 50 California Street, 22nd Floor, San Francisco, California 94111 | TEL 415-875-6600 FAX 415-875-6700
SILICON VALLEY | 555 Twin Dolphin Drive, Suite 560, Redwood Shores, California 94065 | TEL 650-801-5000 FAX 650-801-5100
TOKYO | Akasaka Twin Tower Main Building, 6th Floor, 17-22 Akasaka 2-Chome, Minato-ku, Tokyo 107-0052, Japan | TEL +81-3-5561-1711 FAX +81-3-5561-1712

TOPICS OF EXAMINATION

1. **HP's relationship with PSI, including but not limited to HP's communications and/or dealings with PSI, HP's objectives communicating and/or dealing with PSI, HP's technical assistance to PSI, and any partnership, whether formal or informal, between HP and PSI.**

While reserving its right to seek information from other time periods if necessary, IBM believes that the 2004-2006 timeframe proposed by HP for its response to this topic is acceptable at this time.

IBM does not expect that HP will prepare a witness to testify to every individual communication or contact between PSI and HP. IBM considers topic 1 to cover three areas of relevance to its case against PSI: a) HP's sales and marketing of PSI's products; REDACTED REDACTED REDACTED REDACTED REDACTED and c) technical assistance HP provided PSI to assist it in the development of its product.

Insofar as HP's sales and marketing of PSI's products is relevant to the antitrust counter-claims brought by PSI in this matter, confining testimony to the named set of customers proposed by HP would not provide the full scope of information required by IBM to defend against those claims. Accordingly, IBM proposes that HP provide a witness who can speak to HP's sales and marketing of PSI's products in general.

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Finally, IBM seeks testimony regarding assistance that HP gave to PSI to assist it in developing its product, not, as stated in your letter, technical assistance relating to customers of PSI and/or HP. The nature, development and characteristics of PSI's product are significant questions in this case. Any development assistance provided to PSI by HP is absolutely relevant to these issues, and IBM requests that a witness give testimony on this topic.

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3. **HP microprocessors sold for use in servers that compete with IBM's zSeries servers and S/390 servers, including, without limitation, the processing power, cost and capabilities of such microprocessors and the customers that use such microprocessors.**

Thank you for your clarification that HP does not manufacture microprocessors. This will confirm that the intent of this request is to seek testimony regarding actual or potential competition faced by HP's servers, particularly insofar as they compete with IBM's zSeries and S/390 servers. For this reason, topic 3 would not be addressed by topic 1, which focuses on PSI. Testimony concerning HP's experience separate from its involvement with PSI and PSI's product is directly relevant to this case due to the antitrust counter-claims brought by PSI.

A recitation of detailed benchmarking and performance standards are not the focus of IBM's inquiry, and to the extent that HP produces a witness with knowledge of competition between and among the products identified above, that witness should be able to testify to the general criteria used to assess the competitive aspects of different solutions offered by HP.

4. HP's Mainframe Alternative Consolidation Solutions.

IBM proposes that HP provide a deponent knowledgeable about the general benefits that HP believes its Mainframe Alternative Solutions provide, the components that go into HP Mainframe Alternative Solutions, "success stories" involving HP Mainframe Alternative Solutions, and HP's ISV partnerships related to this program.

This topic is distinct from any information that would be covered in topic 1, as it requests testimony about HP Mainframe Alternative Consolidation Solutions that is not solely limited to PSI's product. For that reason, testimony on this topic could not be limited to the finite customer set proposed by HP in response to IBM's request for a witness on topic 1. Again, PSI's antitrust counter-claims against IBM make testimony on HP's Mainframe Consolidation Solutions directly relevant to the instant case.

5. HP's marketing of and participation in mainframe migration strategies.

For reasons similar to those outlined above, IBM believes that HP's marketing of and participation in mainframe migration strategies is directly relevant to the present lawsuit. If HP produces a witness with sufficient knowledge to testify to topics 3 and 4 as clarified above, we would expect that such a witness would be able to address this topic as well.

6. Actual or potential competition for customers and workloads between IBM z/Series and/or S/390 computer servers and computer servers incorporating HP microprocessors.

If HP produces a witness with sufficient knowledge to testify to topics 3 and 4 as clarified above, we would expect that such a witness would be able to address this topic as well.

7. Whether and to what extent HP believes that end-users of IBM mainframes are "locked-in" to continued use of IBM mainframes, including, without limitation, the reason(s) any such lock-in exists; the specific end users whom HP believes are

"locked-in;" and HP's response to claims that end users of IBM mainframes are "locked-in."

IBM does not seek expert or legal testimony in response to Topic 7. If HP produces a witness with sufficient knowledge to testify to topics 3 and 4 as clarified above, we would expect that such a witness would be able to address this topic as well.

8. The success of HP and OEMs in marketing servers incorporating HP microprocessors to enable partial or total migration of workloads off of IBM mainframes.

First, IBM agrees to limit the scope of this topic to HP's own experience in marketing servers to enable partial or total migration of workloads off of IBM mainframes. If HP produces a witness with sufficient knowledge to testify to topics 3 and 4 as clarified above, we would expect that such a witness would be able to address this topic as well.

9. HP's present and past use of IBM and/or IBM-compatible mainframes; the extent to which HP has moved its workloads off of IBM and/or IBM-compatible mainframes to other platforms, and whether and to what extent HP concluded that it was incapable of migrating any workloads that it was running on IBM mainframes or IBM-compatible mainframes to other platforms.

In the interests of accommodation, IBM agrees to table this topic, reserving its right to request testimony at a later time should IBM be unable to obtain this information through other means.

10. The Itanium Solutions Alliance ("ISA"), including, without limitation, the objectives of the ISA and HP's role in founding, promoting, and/or participating in the ISA.

IBM proposes that HP offer a witness who can testify to HP's involvement with the ISA, limited to the topic of the extent of HP's use of the ISA as a vehicle for promoting mainframe migration. Again, this topic could be addressed by a witness who testifies regarding the topics of competition and mainframe migration, as discussed above.

11. The Mainframe Migration Alliance ("MMA"), including, without limitation, the activities or objectives of the MMA and HP's role in founding, promoting and or participating in the MMA.

Based on HP's representation that it is not a member of the MMA, IBM agrees to withdraw this topic.

12. Any documents relating to this action.

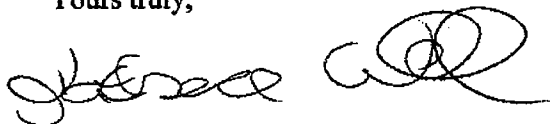
IBM accepts HP's offer to authenticate a reasonable number of documents that IBM identifies to it by Bates number, reserving the right to seek further authentication of documents if necessary.

13. The five persons at HP most knowledgeable concerning each of the foregoing topics.

IBM agrees to withdraw this topic.

We hope that HP will give serious consideration to our proposals, and look forward to discussing them with you in more detail later today.

Yours truly,

A handwritten signature in black ink, appearing to read 'Katherine J. Weall', followed by a large, stylized circular flourish.

Katherine J. Weall, Esq.

EXHIBIT N

From: Kaounis, Angelique
Sent: Thursday, April 10, 2008 11:23 PM
To: Katherine Weall
Cc: Raines, Eric
Subject: IBM v. PSI

Katherine,

I've had a chance to speak to one of my contacts at HP and wanted to report back to you where we stand so we can decide how to move forward. I've summarized the current status of our discussions regarding IBM's 30(b)(6) requests below.

1. HP's relationship with PSI, including but not limited to HP's communications and/or dealings with PSI, HP's objectives in communicating and/or dealing with PSI, HP's technical assistance to PSI, and any partnership, whether formal or informal, between HP and PSI.

As of April 9, 2008 meet and confer:

HP will provide a 30(b)(6) witness who can speak to the sales and marketing of HP's hardware in connection with PSI's solution during 2004-2006 for Banca della Marche, Lufthansa, Fidelity, LL Bean, and Estee Lauder, to the extent such efforts took place during that time period.

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HP will provide a declaration/general written description of HP's technical assistance to PSI during 2004-2006 for Banca della Marche, Lufthansa, Fidelity, LL Bean, and Estee Lauder, to the extent such efforts took place during that time period. As I mentioned to you, I don't think there's much to this one, so HP may be able to provide a short declaration to this effect.

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3. HP microprocessors sold for use in servers that compete with IBM's zSeries servers and S/390 servers, including, without limitation, the processing power, cost and capabilities of such microprocessors and the customers that use such microprocessors.

As of April 9 meet and confer: IBM has revised this category to now seek: "testimony regarding actual or potential competition faced by HP's servers, particularly insofar as they compete with IBM's zSeries and S/390 servers." As re-worded, this topic seems to be coextensive with No. 6, and so we would request that IBM attempt to narrow it in the way we've requested narrowing for No. 6 below.

4. HP's Mainframe Alternative Consolidation solutions.

As of April 9 meet and confer: This is still very broad. As we discussed, HP's website identifies eight ISV relationships and 26 components alone that are part of HP's Mainframe alternative solutions. Please let us know if IBM actually wants a witness who should be prepared to discuss all of these

matters, or if this topic can be narrowed in some meaningful way. I've also requested that HP assist me in providing you with a further potential compromise on this topic, and am waiting to hear back.

5. HP's marketing of and participation in mainframe migration strategies.
As of April 9 meet and confer: HP will provide a 30(b)(6) witness re its participation in mainframe migration strategies to the extent that PSI is/was involved in such efforts as set forth in response to No. 1 above. However, this topic is still very broad. As we discussed, this seems to overlap with Topic # 6, and thus we need further clarification or narrowing before we can attempt to identify a potential witness on this topic.
6. Actual or potential competition for customers and workloads between IBM z/Series and/or S/390 computer servers and computer servers incorporating HP microprocessors.
As of April 9 meet and confer: HP will provide a 30(b)(6) witness re actual competition for customers between IBM z/Series and/or S/390 computer servers and HP servers to the extent that PSI is/was involved in those competitions as set forth in response to No. 1 above. We have asked for a further narrowing of this category, by client (or type/size of client), geographic market, or other criteria before we can produce a witness on other aspects of actual competition between HP and IBM (if at all). Please ask IBM if there is any meaningful way that this topic can be narrowed.
7. Whether and to what extent HP believes that end-users of IBM mainframes are "locked-in" to continued use of IBM mainframes, including, without limitation, the reason(s) any such lock-in exists; the specific end users whom HP believes are "locked-in;" and HP's response to claims that end users of IBM mainframes are "locked-in."
As of April 9 meet and confer: IBM states that this topic is aimed at understanding for example, whether a client of IBM's has ever told an HP salesperson that they "can't get their stuff off of IBM." IBM acknowledges that this topic overlaps with the competition topic (No. 6), and is willing to table this topic to the extent HP provides a witness for No. 6.
8. The success of HP and OEMs in marketing servers incorporating HP microprocessors to enable partial or total migration of workloads off of IBM mainframes.
As of April 9 meet and confer: IBM has agreed to limit this topic to HP's own experience in marketing servers to enable partial or total migration off of IBM mainframes. IBM also acknowledges that this topic overlaps with the competition topic (No. 6). We still feel this topic calls for an expert conclusion as to what is a "successful" migration, however, I think this topic may potentially be resolved by way of a response to a narrowed version of Topic #s 5 or 6.
9. HP's present and past use of IBM and/or IBM-compatible mainframes; the extent to which HP has moved its workloads off of IBM and/or IBM-compatible mainframes to other platforms, and whether and to what extent HP concluded that it was incapable of migrating any workloads that it was running on IBM mainframes or IBM-compatible mainframes to other platforms.
As of April 9 meet and confer: IBM has agreed to table this topic (April 9, 2008 letter).
10. The Itanium Solutions Alliance ("ISA"), including, without limitation, the objectives of the ISA and HP's role in founding, promoting, and/or participating in the ISA.
As of April 9 meet and confer: HP would still like to offer to produce a written response that describes HP's role in promoting, and/or participating in the ISA in 2005-2006.
11. The Mainframe Migration Alliance ("MMA"), including, without limitation, the activities or objectives of the MMA and HP's role in founding, promoting and or participating in the MMA.
As of April 9 meet and confer: IBM has withdrawn this topic.

12. Any documents relating to this action.

As of April 9 meet and confer: HP has agreed to assist with the authentication of a reasonable number of documents.

13. The five persons at HP most knowledgeable concerning each of the foregoing topics.

As of April 9 meet and confer: IBM has withdrawn this topic.

As we discussed, it may be preferable at this point to spend little more time trying to narrow these last few categories (which seem to be focused on the larger issues of migration and competition), before we seek the Court's assistance on this. If you'd like to set up another meet and confer for Monday or Tuesday, perhaps by then we will each have received additional feedback from our clients and may be able to make further progress. Currently, we've agreed that HP would file its motion for a protective order on Tuesday, April 15, so if you want to give the meet and confer efforts one more week, we would be amenable to pushing the briefing schedule back one week to try and resolve these outstanding issues. I'd like to avoid having to file a motion if possible, so please let me know your thoughts.

Thanks,

Angelique

Angelique Kaounis
Gibson, Dunn & Crutcher, LLP
333 South Grand Ave., Los Angeles, CA 90071
akaounis@gibsondunn.com
d: 213.229.7137
f: 213.229.6137

EXHIBIT O

Kaounis, Angelique

From: Jonathan Oblak [jonoblak@quinnemanuel.com]
Sent: Tuesday, April 22, 2008 1:22 PM
To: Kaounis, Angelique
Cc: Raines, Eric; Katherine Weall; Elizabeth Walker; Renee Bea
Subject: RE: IBM v. PSI - Conference Call

Angelique:

To follow up on our call yesterday, here is IBM's response to you email, below.

You are generally correct on the level of specificity we are seeking regarding the noticed topics, as clarified during our meet and confer efforts. IBM expects the HP witness or witnesses to have a general familiarity with HP's Mainframe Alternative Solutions Program, HP's mainframe migration strategies, and HP's overall strategy and conduct in competing with IBM's z/Series and s/390 mainframes, including PSI's possible/actual role in such strategies and efforts. IBM also expects the witness or witnesses to be able to comment on whether a particular communication, document, component or customer relationship is consistent or inconsistent with HP's strategies and conduct relating to those issues, in the event they do not have specific familiarity with a particular communication, document, component or customer relationship.

One other general clarification regarding the applicable time periods. As I mentioned yesterday, we believe that the appropriate timeframe with respect to topics relating specifically to PSI is from 2003 until the termination of HP's business relationship with PSI. We have done some investigation on our end (which is why this email did not go out this morning). and our review of documents produced by PSI reflects that

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:003 is the appropriate starting point.

For requests that are not specific to PSI, such as topics 3-8, the relevant time period should be 2003 through the present.

For ease of reference, I have pasted your summary as to the specific categories below, with any further clarification on IBM's part in "all caps."

I hope that, with the clarifications provided herein, we can reach agreement and proceed with the 30(b)(6) deposition without the need of Court intervention. Please advise of HP's position at your earliest convenience.

Best regards,
Jon

Topics No. 1 and 2 (proposal is for testimony unless otherwise noted): [ACCEPTABLE WITH THE CLARIFICATION ABOVE AS TO TIME PERIOD, AND AS FURTHER CLARIFIED BELOW]

* The general reasons why **REDACTED**

* At a general level (not client-by-client), the extent to which HP provided technical support and/or marketing in support of PSI's solution, if at all, during 2004-2006.

* HP's overall strategy, if any, regarding the use of PSI's solution to enhance HP's competitive position against IBM in marketing mainframe alternatives in 2004-2006. [AS NOTED YESTERDAY, WE WOULD EXPECT THE WITNESS OR WITNESSES TESTIFYING WITH RESPECT TO HP'S RELATIONSHIP WITH PSI TO BE FAMILIAR WITH HP/PSI COMMUNICATIONS RELATING TO THEIR AREA OF KNOWLEDGE (RECOGNIZING THAT HP MAY OFFER MORE THAN ONE WITNESS FOR DIFFERENT ASPECTS OF ITS RELATIONSHIP WITH PSI).

* HP has offered to provide a declaration regarding the technical assistance that HP provided to PSI in the development of its solution, which, as I explained, is fairly limited, in that I believe HP only permitted PSI to do performance testing of its solution on HP hardware.

Topics 3, 4, 5, 6, 7, and 8 (proposal is for testimony unless otherwise noted): [ACCEPTABLE WITH THE CLARIFICATION ABOVE AS TO TIME PERIOD, AND AS FURTHER CLARIFIED BELOW]

* The general purpose and operation of HP's mainframe alternative solutions program during 2004-2006, including a general discussion of whether HP believes it competes or does not compete with IBM's z/series and s/390 servers. [FOR CLARIFICATION, THIS WOULD INCLUDE GENERAL MIGRATION STRATEGIES AND EFFORTS, AS WELL AS SPECIFICALLY WITH RESPECT TO HP'S MAINFRAME ALTERNATIVE SOLUTIONS PROGRAM]

* HP's general understanding of the conditions during 2004-2006 that made migration off of IBM mainframes more or less challenging.

*Caveat with regard to Topic No. 7: With regard to this Topic, HP continues to believe that this is an inappropriate Topic because it essentially asks HP to opine on an ultimate issue in this case and because any testimony IBM could elicit on this point would be hearsay and unusable in any event. I would suggest that if IBM believes there are specific customers who have complained about being "locked-in" to IBM's mainframe, that we discuss the possibility of IBM asking general questions about whether HP is aware of efforts to market mainframe alternative solutions to those customers during 2004-2006. If this is a reasonable compromise, I will take this back to HP for confirmation. [AS I STATED YESTERDAY, IBM DISAGREES WITH HP'S POSITION ON THIS TOPIC AND CANNOT IDENTIFY FOR HP SPECIFIC CUSTOMERS WHO HAVE COMPLAINED TO HP OF "LOCK IN." WE EXPECT THAT A WITNESS OR WITNESSES WITH KNOWLEDGE REGARDING THE TOPICS AS CLARIFIED ABOVE WOULD ALSO HAVE GENERAL KNOWLEDGE OF THE DEGREE TO WHICH HP HAS EXPERIENCE WITH CUSTOMERS RESPONDING THAT THEY CANNOT FOR SOME REASON MIGRATE WORKLOADS OR APPLICATIONS OFF OF IBM MAINFRAMES, OR THAT HP SERVERS ARE NOT A REASONABLE SUBSTITUTE FOR IBM MAINFRAMES. IN ADDITION TO HP'S GENERAL EXPERIENCE WITH THIS PHENOMENON, IF ANY, WE WOULD ALSO EXPECT THE WITNESS OR WITNESSES TO HAVE KNOWLEDGE OF HP'S VIEW AS TO WHETHER THIS TYPE OF "LOCK IN" EXISTS -- IN OTHER WORDS, WHETHER HP BELIEVES THAT IT IS INCAPABLE OF COMPETING OR SERVING AS A REASONABLE SUBSTITUTE FOR CERTAIN WORKLOADS OR APPLICATIONS THAT RUN ON IBM MAINFRAMES.

Topic 9: tabled.

Topic 10: [ACCEPTABLE EXCEPT AS TO TIME PERIOD -- UNLESS HP'S INVOLVEMENT IN THE ISA ENDED IN 2006 OR AT SOME OTHER DATE, WE WOULD EXPECT THE TIME PERIOD TO RUN THROUGH THE PRESENT]

* HP has offered to provide a written declaration regarding HP's promotion of and participation in the ISA, during 2005-2006, to the extent that such participation and promotion relates to migration from IBM mainframes.

Topics 11 and 13: withdrawn. [AGREED]

Topic 12: IBM has agreed to accept HP's offer regarding authentication. [AGREED]

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From: Kaounis, Angelique [mailto:AKaounis@gibsondunn.com]
Sent: Thursday, April 17, 2008 1:17 PM
To: Jonathan Oblak
Cc: Raines, Eric; Katherine Weall; Elizabeth Walker
Subject: RE: IBM v. PSI - Conference Call

Jonathan,

I write to follow up on our meet and confer efforts of Tuesday, April 15. The list of topics below reflects HP's effort to propose 30(b)(6) topics (and some written responses) that are consistent with our April 15 meet and confer. Our meet and confer was very helpful, as we now understand that IBM is not requesting that HP prepare a witness to testify regarding the details of (a) HP's mainframe alternative solutions; (b) HP's mainframe migration strategy; or (c) HP's relationships or interactions with specific customers at the "granular" level, but instead is only concerned with the "top line" strategies and actions of HP in competing with IBM's z/series and s/390 machines, and specifically, how PSI would have been a part of that strategy. As we understand your offer, IBM does not expect that HP's potential deponent(s) will be familiar with specific communications, documents, components of HP's mainframe alternative solutions, or client or ISV relationships; however, a deponent may be asked to comment on whether a particular communication, document, component, or relationship would be consistent or inconsistent with HP's understanding and strategy at a broader level. Please let us know if the topics below do not fully reflect IBM's offer and the areas of interest that you expressed over the phone. As I mentioned, HP would like to avoid motion practice if at all possible, and since our current filing deadline is Tuesday, April 22, we would appreciate it if you could respond to the below proposal by tomorrow, April 18. In light of the below, we are hopeful that IBM will agree to move forward without the need to resort to motion practice.

Best regards,
Angelique

Topics No. 1 and 2 (proposal is for testimony unless otherwise noted):

- * The general reasons why] **REDACTED**
- * At a general level (not client-by-client), the extent to which HP provided technical support and/or marketing in support of PSI's solution, if at all, during 2004-2006.
- * HP's overall strategy, if any, regarding the use of PSI's solution to enhance HP's competitive position against IBM in marketing mainframe alternatives in 2004-2006.
- * HP has offered to provide a declaration regarding the technical assistance that HP provided to PSI in the development of its solution, which, as I explained, is fairly limited, in that I believe HP only permitted PSI to do performance testing of its solution on HP hardware.

Topics 3, 4, 5, 6, 7, and 8 (proposal is for testimony unless otherwise noted):

- * The general purpose and operation of HP's mainframe alternative solutions program during 2004-2006, including a general discussion of whether HP believes it competes or does not compete with IBM's z/series and s/390 servers.

* HP's general understanding of the conditions during 2004-2006 that made migration off of IBM mainframes more or less challenging.

*Caveat with regard to Topic No. 7: With regard to this Topic, HP continues to believe that this is an inappropriate Topic because it essentially asks HP to opine on an ultimate issue in this case and because any testimony IBM could elicit on this point would be hearsay and unusable in any event. I would suggest that if IBM believes there are specific customers who have complained about being "locked-in" to IBM's mainframe, that we discuss the possibility of IBM asking general questions about whether HP is aware of efforts to market mainframe alternative solutions to those customers during 2004-2006. If this is a reasonable compromise, I will take this back to HP for confirmation.

Topic 9: tabled.

Topic 10:

* HP has offered to provide a written declaration regarding HP's promotion of and participation in the ISA, during 2005-2006, to the extent that such participation and promotion relates to migration from IBM mainframes.

Topics 11 and 13: withdrawn.

Topic 12: IBM has agreed to accept HP's offer regarding authentication.

EXHIBIT Q

From: Kaounis, Angelique
Sent: Thursday, April 24, 2008 11:37 AM
To: Jonathan Oblak
Cc: Raines, Eric; Katherine Weall; Elizabeth Walker; Renee Bea
Subject: RE: IBM v. PSI - Conference Call

Jon,

Thank you for your agreement to allow the filing to take place on Tuesday--we will obviously work with you in good faith to get the remaining issues resolved (hopefully today) so that we can move forward in whatever way is most expeditious. To answer your question as to the expedited briefing schedule, the Northern District of California has an extremely busy docket (in fact, as I understand it, the busiest in the country right now), so the earliest we can get a regularly noticed motion heard is June 2. In the Northern District, you can file a motion to shorten the time for a briefing schedule, and we certainly would not oppose such an administrative motion, assuming it provided HP with a reasonable time in which to prepare a reply brief.

REDACTED REDACTED REDACTED REDACTED

REDACTED. Also, as you are likely aware, post-November 2006, PSI remained an authorized reseller of HP hardware, but its relationship with HP was no different than any other reseller. Thus, to the extent there is no dispute about the scope of these depositions, we will obviously work with both IBM and PSI to schedule the depositions at a mutually convenient time for everyone, as we have offered to do from the start of our discussions on this topic.

Also, I have now had the chance to speak with HP regarding what seems to be the only remaining dispute at this point --i.e., the timeframe at issue. Instead of resorting to motion practice at this point, I really do believe the best way to proceed is to go forward with the deposition limited to the 2003-2006 time period with the following caveat: with respect to the testimony regarding HP's post-2006 competitive efforts in the market for mainframe alternative solutions, in addition to providing testimony regarding the general purpose and operation of HP's mainframe alternative solutions program during 2004-2006 (including a general discussion of whether HP believes it competes or does not compete with IBM's z/series and s/390 servers), we will agree to supplement this topic by preparing a witness to discuss whether, and if so, how the general purpose and operation of HP's mainframe alternative solutions program has changed from 2006 to the present. The same deponent will be able to discuss whether HP believes that it still competes with IBM's mainframe offerings. However, in the case of post-2006 testimony, this would not include any discussion of non-public information.

Regarding HP's post-2006 migration strategies, as I have mentioned before, IBM can find responsive material on HP's website, and we have already offered to authenticate this material. This should be an acceptable substitute for a live witness, and significantly reduces the burden to HP and the risk of divulging highly confidential proprietary information.

Furthermore, while I appreciate your discussion of the Protective Order, please keep in mind that the protection afforded by the order does not eliminate the requirement that IBM show relevance and necessity for this information. As I'm sure you can appreciate, once HP demonstrates that this is competitively sensitive information, the burden shifts to IBM to make the requisite Rule 45(c) showing of "substantial need" for the material prior to gaining access to the confidential proprietary and/or trade secret material. HP is not convinced that IBM's general statement below regarding relevance is sufficient to meet that standard.

As a final compromise, I would suggest we go forward with the deposition(s) as outlined above, and to the

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extent that IBM seeks competitively sensitive information to which HP objects, IBM can later decide whether it needs to move to compel HP to respond to any questions its witnesses do not answer. Please strongly urge IBM to reconsider its position on this. Given that HP is willing to provide so much already, and given the heightened sensitivity of the 2006-2008 information, HP believes that its position is extremely reasonable.

I believe we're very close on reaching an agreement and look to hearing back from you.

Thanks very much,
Angelique

4/28/2008